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WINDS OF CHANGE: THE CREATION OF WIND LAW

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I. INTRODUCTION

In several respects, wind law at the beginning of the second decade of the twenty-first century is analogous to oil and gas law during the early decades of the twentieth century. The analogy is most striking with the law, or lack thereof, for upstream transactions. Although wind farms have obtained hundreds of thousands of easements, wind leases, and other types of development rights, there is, as of yet, no case law interpreting the provisions of these documents.¹ Similarly, severances of wind rights, either in the form of easements or outright grants of wind rights, have occurred in many states, but there is scant case and statutory law on the effect and validity of such transactions. In many states, the location of wind turbines is either unregulated or delegated to local agencies.

One area where wind law currently does exist is also strikingly similar to the same area for early oil and gas law. Congress encouraged oil and gas development by including special preferential tax provisions in the early versions of the Internal Revenue Code. The same is true of wind energy. The federal government and many state legislatures have recognized the importance of wind energy by enacting statutes giving special tax treatment to or otherwise promoting the development of wind energy.

There are, however, some striking differences between early oil and gas law and current wind law. Whereas there was little in the way of early judicial or statutory authority dealing with the transportation of oil and gas, transmission of wind-generated electricity is extensively governed by regulations promulgated by state public utility commissions and, outside most of Texas, by the Federal Energy Regulatory Commission (“FERC”). The same is true of the sale of electricity in many states.

The ultimate development of extensive judicial and statutory law for wind from far upstream to downstream consumption of electricity is inevitable. In terms of percentage increase, wind energy is easily the fastest growing source of energy in the United States. In 2009 the installed wind power generating capacity in the United States increased by 39%, and in 2008 wind was responsible for 42% of all new generating

1. There are, however, several articles and papers that extensively detail and analyze the contents of wind leases. *See, e.g.*, K. K. DuVivier & Roderick E. Wetsel, *Jousting at Windmills: When Wind Power Development Collides with Oil, Gas and Mineral Development*, 55 ROCKY MTN. MIN. L. INST. 9-1 (2009); Roderick E. Wetsel & H. Alan Carmichael, *Current Issues in Wind Energy Law 2010*, 2010 WIND, SOLAR & RENEWABLES INST. 16 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

capacity added in the United States.² The U.S. wind industry broke all previous records by installing close to 10,000 megawatts (“MW”) of new generating capacity in 2009.³ Total U.S. wind capacity is over 35,000 MW, enough to power the equivalent of 9.7 million homes.⁴ Although China is rapidly catching up, the United States is currently the global leader in total installed capacity of wind-generated electricity. The concern at both the federal and state levels about climate change and reducing carbon emissions virtually assures that more, and perhaps more rapid, development of wind resources will occur in the future.

Texas stands at the forefront of this development. The state leads the country in wind generating capacity with 9,410 MW installed as of the end of 2009, more than 25% of the total wind capacity installed in the United States. Iowa and California are a distant second and third with 3,670 MW and 2,794 MW installed respectively.⁵ Texas is likely to remain the national leader in installed wind generation far into the future, and newly released wind potential rankings also show Texas as the state with the most wind potential. Utility-scale wind farms require an average wind speed of 6 meters per second (approximately 13 mph), and the wind must be reasonably constant. Texas has a wind generating potential of over 1,900 billion kilowatt hours (“kWh”) annually, which ranks the state ahead of Kansas, Montana, Nebraska, and the Dakotas.⁶ Given the population of those states and their electric load requirements and transmission capacity, Texas will almost certainly maintain its position as number one in installed generating capacity. Recently, Texas has continued to widen its lead as it installed 2,292 MW of wind in 2009, more than double any other state.⁷ If Texas was a country, it would be ranked sixth in total wind power installed, behind only the United States, Germany, Spain, China, and India.⁸

2. Am. Wind Energy Ass’n (“AWEA”), WIND POWER OUTLOOK 2009, at 1 (2009), available at http://www.awea.org/pubs/documents/Outlook_2009.pdf; Press Release, AWEA, U.S. Wind Energy Industry Breaks All Records, Installs Nearly 10,000 MW in 2009 Manufacturing Investment, Jobs Still Lag (Jan. 26, 2010) [hereinafter Press Release, AWEA], available at http://www.awea.org/newsroom/releases/01-26-10_AWEA_q4_and_Year-End_Report_Release.html.

3. AWEA, YEAR END 2009 MARKET REPORT 1 (2010) [hereinafter AWEA, MARKET REPORT], available at <http://www.awea.org/publications/reports/4Q09.pdf>.

4. Press Release, AWEA, *supra* note 2.

5. AWEA, Resources: U.S. Wind Energy Projects (as of Dec. 31, 2009), <http://www.awea.org/projects> (last visited May 10, 2010).

6. Press Release, AWEA, U.S. Wind Resource Even Larger Than Previously Estimated: Government Assessment (Feb. 18, 2010), available at http://www.awea.org/newsroom/releases/02-18-10_US_Wind_Resource_Larger.html.

7. AWEA, MARKET REPORT, *supra* note 3.

8. Top 10 Total Installed Capacity 2008, Global Wind Energy Council, <http://www.gwec.net/fileadmin/documents/testfolder/Top%2010%20total%20installed%20capacity%202008.jpg> (last visited May 10, 2010); Wind Coalition, <http://www.windcoalition.org/> (last visited May 10, 2010).

A variety of federal and state incentives, including tax credits, renewable portfolio standards, and property tax abatements, have assisted in the wind industry's dramatic growth. While pro-wind statutes have attracted wind farms to certain states over others, the absence of permitting and siting statutes has done the same. In addition, as case law specific to wind farms develops, favorable case law may also lead developers to prefer some states over others for the siting of wind farms. This article reviews the development of wind law in Texas. As the state with by far the most wind development, a review of statutes related to wind provides insight into how those statutes (and the lack of others) lead to growth in the wind industry. Further, the large number of wind farms in the state has led to more wind-related lawsuits being filed in Texas than in any other state. Thus, a review of Texas wind case law best provides insight into the initial development of wind law. This article also discusses select wind cases and statutes from other states to further explore how wind law is developing, and it examines areas where case law is lacking, but likely to appear soon.

II. GOVERNMENTAL INCENTIVES

A. *Federal Incentives*

The surge of wind power has occurred primarily because of two major incentives. The principal incentive is the federal Production Tax Credit ("PTC"), which is an income tax credit for each kWh of electricity produced by a qualified wind energy facility during its first ten years of operation.⁹ The tax credit, originally passed in 1992 at a rate of 1.5¢ per kWh, is adjusted annually for inflation and reached 2.1¢ cents for each kWh generated in 2009.¹⁰ Without the PTCs, most commentators agree that many wind farms would not be profitable and far fewer would be built.

The American Recovery and Reinvestment Act of 2009 (commonly known as the Stimulus Bill) was passed by Congress and signed by the President in February 2009.¹¹ The bill contains a number of provisions to fund renewable energy with \$50 billion allocated for renewable energy investment and transmission upgrades.¹² Significantly, the PTC was extended for three years in hopes of eliminating the drop off in new wind

9. 26 U.S.C. § 45 (2009).

10. *Id.*; AWEA, Production Tax Credit, <http://www.awea.org/policy/ptc.html> (last visited May 10, 2010).

11. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) [hereinafter "Stimulus Bill"].

12. Mark Del Franco, *Stimulus Bill Set to Kick Wind Into High Gear*, N. AM. WINDPOWER, Mar. 2009, at 1.

farms seen in past years when the PTC was allowed to expire.¹³ The Stimulus Bill also gave project developers the new option¹⁴ of electing an Investment Tax Credit (“ITC”) of 30% of the project’s cost the year the facility begins commercial operations instead of receiving PTCs over ten years.¹⁵ ITCs are not reliant on actual energy production, so they may be seen by investors as a better, more certain form of tax credit.¹⁶ Cash grants provide a third option that new wind projects may receive instead of ITCs or PTCs.¹⁷ The Treasury Department expects to distribute at least \$3 billion in financial support to approximately 5,000 biomass, solar, wind, and other types of renewable energy production facilities through cash grants in lieu of tax credits.¹⁸ The grants are limited to 30% of the cost basis for the wind project,¹⁹ and they are particularly attractive because ITCs and PTCs require tax equity investors (which have been especially hard to find due to the recession), but grants do not require any party to have a tax appetite.²⁰ A bill introduced in the Senate in 2009 would extend the cash grant program through the end of 2012, and several other bills to create or extend other renewable energy incentives have also been proposed.²¹

13. Stimulus Bill § 1011; Del Franco, *supra* note 12. For further analysis of the impact of PTC expirations on the wind industry, see also Becky H. Diffen, *Competitive Renewable Energy Zones: How the Texas Wind Industry is Cracking the Chicken and Egg Problem*, 46 ROCKY MTN. MIN. L. INST. 47, 52-53 (2009).

14. The ITC program was already in place for certain other technologies, but the Stimulus Bill extended it for three years and allowed wind to qualify for ITCs for the first time. Steve Krebs, *Which Way Do We Go? Grants, ITC & PTC for Renewable Energy Projects*, 2010 WIND, SOLAR & RENEWABLES INST. 11, at 2 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

15. 26 U.S.C. § 48 (West Supp. 2009); George M. Gerachis, *Basics of Oil & Gas Tax*, 35TH ANNUAL OIL, GAS & MINERAL LAW INST. 8, at 10 (Univ. of Tex. Sch. of Law Continuing Legal Educ. 2009); AWEA, SUMMARY OF THE AMERICAN RECOVERY & REINVESTMENT ACT OF 2009: PROVISIONS OF INTEREST TO THE WIND ENERGY INDUSTRY 2-3 (2009), available at http://www.awea.org/legislative/pdf/ARRA_Provisions_of_Interest_to_Wind_Energy_Industry.pdf [hereinafter AWEA, SUMMARY]. The IRS issued a notice in June explaining the process for obtaining ITC’s. See INTERNAL REVENUE SERVICE, INTERNAL REVENUE BULLETIN: 2009-25 (2009), available at http://www.irs.gov/irb/2009-25_IRB/ar09.html (last visited May 10, 2010).

16. Gerachis, *supra* note 15, at 10.

17. Stimulus Bill § 1603 (codified at I.R.C. § 48 (West 2009)).

18. AMERICAN COUNCIL ON RENEWABLE ENERGY, OVERVIEW RENEWABLE ENERGY PROVISIONS: AMERICAN RECOVERY & REINVESTMENT ACT OF 2009 at 2, available at http://www.acore.org/files/images/email/acore_stimulus_overview.pdf.

19. Stimulus Bill § 1603 (codified at I.R.C. § 48 (West 2009)). The Treasury Department has posted more information and a guidance document on their website. See U.S. TREASURY DEP’T, PAYMENTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS UNDER THE AMERICAN RECOVERY & REINVESTMENT ACT OF 2009 (2009), available at <http://www.treas.gov/recovery/docs/guidance.pdf>; American Recovery and Reinvestment Act, U.S. Treasury Dep’t, <http://www.treas.gov/recovery/1603.shtml>.

20. Krebs, *supra* note 14, at 5.

21. See, e.g., S. 1733, 111th Cong. (2010); S. 2899, 111th Cong. (2009); see also *Proposal Would Extend Cash Grant for Renewables to 2012*, GREEN TECHNOLOGY DAILY.COM, Dec. 28, 2009, <http://www.greentechnologydaily.com/energy/576-proposal-would-extend-cash-grant-for-renewables-to-2012>; Renewable Energy Tax Credit Resource Center, Novogradac & Co. LLP, <http://www.novoco.com/energy/index.php> (last visited May 10, 2010).

Unfortunately, the credit crisis that began in 2008 and has extended into 2010 has made it difficult for developers to finance wind projects, so the bill attempted to address this issue as well. The government now offers Clean Energy Renewable Bonds to finance wind projects, and it has instituted a loan guarantee program for certain projects that begin construction by the end of September 2011.²² The Stimulus Bill allocates \$20 billion in tax incentives for renewable and energy efficiency projects for ten years and creates a new manufacturing investment tax credit for investment in innovative green technologies.²³ Bonus depreciation is extended for capital expenditures incurred in 2009. The bill also awards funds to a variety of energy efficiency programs.²⁴

Opponents of wind generation commonly object to PTCs and other government funding, which some argue give wind an unfair competitive advantage. Wind is, of course, far from the only energy source that receives special tax treatment. Electricity produced from solar and most other renewable sources of energy also qualify for PTCs and other Stimulus Bill incentives, but, more importantly, the traditional, non-renewable sources of energy get special tax treatment too. Oil and gas producers and investors can expense, rather than capitalize, their intangible drilling costs, and they also receive a depletion allowance that permits reduction of the basis in property to below zero.²⁵ These tax subsidies give natural gas, the second most important energy source for electric generation, a significant competitive advantage. Further, coal, the principal fuel for generating electricity, also receives a depletion allowance. Both coal and natural gas have received favorable tax treatment to encourage their development for decades, almost since the inception of the Internal Revenue Code; whereas the PTC for wind dates back only to the Energy Policy Act of 1992.²⁶

B. Renewable Portfolio Standards

The second legal force driving wind development is the renewable portfolio standard (“RPS”). More than half the states in the United

22. 42 U.S.C. § 16516 (2009); I.R.C. § 54C (West 2009); Gerachis, *supra* note 15, at 10; AWEA, SUMMARY, *supra* note 15, at 2–3.

23. I.R.C. § 48C (West 2009); *see also* Del Franco, *supra* note 12, at 28; Gerachis, *supra* note 15, at 10; AWEA, SUMMARY, *supra* note 15, at 2–3.

24. I.R.C. § 168 (West 2009); AWEA, SUMMARY, *supra* note 15, at 2.

25. OWEN L. ANDERSON ET AL., HEMINGWAY OIL AND GAS LAW AND TAXATION chs. 10–12 (4th ed. 2004) (discussing the tax treatment accorded oil and gas operations).

26. A recent study by the Environmental Law Institute provides a detailed comparison of government subsidies for fossil fuels and renewable energy. It concludes that the federal government provided substantially larger subsidies to fossil fuels than to renewables. ENVTL. LAW INST., ESTIMATING U.S. GOVERNMENT SUBSIDIES TO ENERGY SOURCES: 2002-2008 (2009), available at http://www.elistore.org/Data/products/d19_07.pdf. For a brief summary of the report, see also Press Release, Env'tl. Law Inst., U.S. Tax Breaks Subsidize Foreign Oil Production (Sept. 18, 2009), available at <http://www.eli.org/pressdetail.cfm?ID=205>.

States currently have an RPS.²⁷ There has been much discussion of a national RPS,²⁸ and while several bills have been proposed in both the House and Senate over the last few years, legislation has yet to pass both houses.²⁹ The Texas RPS—the first significant RPS of its kind in the nation—was established in 1999 as part of the Texas Legislature’s comprehensive restructuring of the electric industry in Texas.³⁰ Senate Bill 7 received near unanimous support in both the house and senate,³¹ and it set a statewide goal of 2,000 MW of new renewable energy installation by 2009.³² This bill marked the first time Texas ever had a renewable energy policy.³³ The bill set interim goals for utilities to meet beginning in 2003 and rising every other year until the target was met by 2009.³⁴ While the goal level was based on a capacity value (MW), in implementing the program the Public Utilities Commission of Texas very intelligently decided that the system must use energy values (MWh) in order to function effectively.³⁵

The strength of Texas’s RPS is the unique Renewable Energy Credits (“RECs”) created in order to effectuate the program. Texas was the first state to use this highly innovative mechanism to stimulate renewable energy production.³⁶ RECs are a kind of currency³⁷—for every MWh of electricity generated from an eligible renewable generation source, a REC is also created. Utilities can then buy those RECs, either from the generators or on the open market, and retire them in order to meet their required level of renewable generation prescribed by the RPS (determined by market share). Likewise, a utility with more RECs than it is required to retire can sell or trade its excess RECs to a utility that

27. AWEA, Renewable Electricity Standard (RES), http://www.awea.org/policy/renewables_portfolio_standard.html (last visited May 10, 2010); U.S. Dep’t of Energy, Information Resources: States with Renewable Portfolio Standards, http://apps1.eere.energy.gov/states/maps/renewable_portfolio_states.cfm (last visited May 10, 2010).

28. See, e.g., Sanya Carleyolsen, *Tangled in the Wires: An Assessment of the Existing U.S. Renewable Energy Legal Framework*, 46 NAT. RESOURCES J. 759 (2006); Christopher Cooper & Benjamin K. Sovacool, *Congress Got it Wrong: The Case for a National Renewable Portfolio Standard and Implications for Policy*, 3 ENVTL. & ENERGY L. & POL’Y J. 85 (2008).

29. AWEA, Nat’l Renewable Electricity Standard (RES), <http://www.awea.org/legislative/#RES> (last visited May 10, 2010).

30. Tex. S.B. 7, 76th Leg., R.S. (1999); see Mark Dreyfus, *Renewable Energy Policy in Texas: From the Goal to the CREZ-Successes and Challenges*, 2007 WIND ENERGY INST. 9, at 1 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

31. Tex. S.B. 7, 76th Leg., R.S. (1999); see Dreyfus, *supra* note 30.

32. TEX. UTIL. CODE ANN. § 39.904 (Vernon 2007).

33. Dreyfus, *supra* note 30, at 1-2.

34. TEX. UTIL. CODE ANN. § 39.904(a) (Vernon 2007).

35. Dreyfus, *supra* note 30, at 2. MW describes the *potential* capacity of a wind farm—what it is capable of generating when operating at full strength with optimal winds. MWh (megawatt-hours) describes how much electricity is *actually* generated, making it a better measurement for determining renewable energy levels.

36. *Id.*

37. David Hurlbut, *A Look Behind the Texas Renewable Portfolio Standard*, 48 NAT. RESOURCES J. 128, 144-47 (2008).

needs more RECs in order to satisfy its own requirements. Because RECs are easily tradable, transaction costs are reduced for the utilities and monitoring costs are reduced for the regulatory agencies.³⁸ The rules also establish a meaningful penalty for failure to comply by charging the lesser of \$50 per credit or two times the average REC market value for the year.³⁹ The system has functioned very well, as the price of RECs responds to supply and demand conditions in the REC market—with demand created by the RPS and other voluntary retirement of RECs, and supply furnished by the installation of a large number of wind farms.⁴⁰ One report compliments the system after just a few years in place, stating, “By forcing energy companies to deal with renewable energy on a large scale, the Texas policy has tapped into economies of scale that make renewable power attractive economically. The companies have since invested in more than twice as much of the once-unfamiliar technologies.”⁴¹

The 2,000 MW goal was met in 2005,⁴² and the legislature acted again by passing Senate Bill 20 in the first special session of 2005. The bill amended § 39.904(a) of the Public Utility Regulatory Act to increase the RPS to 5,880 MW of renewable energy by 2015.⁴³ It also set a target of 10,000 MW by 2025 and a carve-out of 500 MW of non-wind renewable generation, although these are targets and not requirements.⁴⁴ As of the end of 2009, Texas has 9,410 MW of operating wind generation, again meeting the RPS requirements several years early.⁴⁵ There is no doubt that the combination of an excellent wind resource and a well thought out and implemented RPS/REC system are largely responsible for the rapid growth the Texas wind industry has experienced.⁴⁶

A strong RPS can also take a state with an average wind resource and help it become a leader in wind development. No state demonstrates this better than Iowa. Iowa is ranked tenth in wind potential, but recently passed California to become the second ranked state in total wind

38. *Id.* at 146–47; AUSTIN CLEAN ENERGY INITIATIVE, ENRICHING ECONOMY AND ENVIRONMENT: MAKING CENTRAL TEXAS THE CENTER FOR CLEAN ENERGY 78 (2002), available at <http://www.austincleanenergy.org/ace/report/AceReport.pdf> [hereinafter ACE Report].

39. Dreyfus, *supra* note 30, at 2; see 16 TEX. ADMIN. CODE § 25.173(o)(2) (West 2009).

40. Dreyfus, *supra* note 30, at 9.

41. ACE Report, *supra* note 38, at 77.

42. GÜRCAN GÜLEN ET AL., RPS IN TEXAS: LESSONS LEARNED & WAY FORWARD 8 (2009), available at <http://usaee.org/usaee2009/submissions/onlineproceedings/gulen%20et%20al.pdf>.

43. TEX. UTIL. CODE ANN. § 39.904(a) (Vernon 2007). The state met the 5,880 MW target in 2008.

44. *Id.*

45. AWEA, MARKET REPORT, *supra* note 3, at 3.

46. See GÜLEN ET AL., *supra* note 42, at 13 (discussing both the successes and failures of the Texas RPS).

capacity installed.⁴⁷ Further, Iowa leads the nation in percentage of power output generated by wind with 15%.⁴⁸ A version of Iowa's RPS was first enacted in 1983 with revisions in 1991 and 1994.⁴⁹ In addition to that early RPS requirement, in 2001 Iowa's governor created a voluntary goal of 1,000 MW of wind capacity,⁵⁰ and in 2007 that goal was increased to 2015 MW.⁵¹ Early enactment of an RPS has been one of the factors that led to Iowa's success in the wind industry.

C. Tax Abatements

Tax abatements are one of the least discussed steps in the wind development process, but the favorable tax statutes under Texas law have been an additional factor in the rapid growth of wind farms in the state. Unlike traditional electric generators, wind farms have no fuel costs; however, they are extremely capital-intensive energy projects, and the high capital cost, combined with the slow depreciation and long life of the turbines and the expansive real estate requirements, makes high property taxes a significant operating expense over the life of a project. The value of the turbines and associated infrastructure of a typical wind farm is in the hundreds of millions of dollars, so when a wind farm is built, the taxable property value of the land skyrockets. Lease agreements between developers and landowners stipulate that the owner of the wind farm will be responsible for paying the additional taxes attributable to the fixtures and improvements that are owned by the wind farm owner. In order to lower the amount of property taxes that will be owed in the future, wind developers typically negotiate tax abatements and related agreements with counties, school districts, and other taxing entities. As of early 2009, all but one of the more than 30 operating wind farms in Texas had some sort of tax abatement agreement in place.⁵²

There are two different types of tax abatements in Texas.⁵³ Under chapter 313 of the Texas Tax Code, school districts may implement value

47. AWEA, MARKET REPORT, *supra* note 3, at 3; AWEA, U.S. Wind Energy Projects—Iowa, <http://www.awea.org/projects/projects.aspx?s=Iowa> (last visited May 10, 2010).

48. Phil Hall, *Iowa's Early Wind Planning Pays Dividends*, N. AM. WINDPOWER, Nov. 2009, at 6, 6.

49. *Id.*; accord IOWA CODE §§ 476.41-.104 (2009).

50. Press Release, Office of the Governor of Iowa, Governor Culver, TPI Announce New Wind Turbine Production Facility (Nov. 26, 2007), available at www.governor.iowa.gov/news/2007/11/26_1.php.

51. Database of State Incentives for Renewables & Efficiency, Iowa Incentives/Policies for Renewables & Efficiency, http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=IA01R&state=IA&CurrentPageID=1 (last visited May 10, 2010).

52. Roderick E. Wetsel & H. Alan Carmichael, *Current Issues in Wind Energy Law 2009*, 2009 WIND ENERGY INST. 11, at 20 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

53. For more information on obtaining tax abatements for wind farms in Texas, see Charles L. Black, *Wind Energy Development in Texas—From Where the Wind Blows (A Local Perspective)*, 2007 WIND ENERGY INST. 14, at 1–9 (Univ. of Tex. Sch. of Law Continuing Legal Educ.); Kevin O'Hanlon & Annabel Canchola, *Tax Abatement and Wind Development: A*

limitation agreements.⁵⁴ Typical agreements break the taxable value of the project into three time periods:

- Years 1–2: The project pays full taxes (required by statute).
- Years 3–10: The project is taxed at the minimum value allowed (set by statute).
- Year 11 and beyond: The project is again taxed at full value.

The time periods above demonstrate the maximum amount of time the statutes allow a project to be taxed at a lower value. School districts have incentive to minimize the taxes paid by the wind project as much as possible due to Texas's "Robin Hood" system of school finance. In Texas rich school districts are required to share their tax revenue with poor school districts. Most of the school districts impacted by wind farms are poor districts as they are located in rural areas. However, the property taxes generated by a single wind farm often is enough to turn a poor, rural school district into a rich one—which would mean the school district would have to send most of the money it received from increased property taxes to the state to be shared with poor school districts. The school districts with wind farms would obviously prefer to keep the money gained from having a wind farm, so they will usually grant a value limitation for the maximum amount. The wind farm, in turn, is expected to agree to share the savings by paying the school district a payment in lieu of taxes ("PILOT") that is typically about 40-50% of the amount saved by the wind farm by having a lower valuation.

Counties and other taxing entities that impose ad valorem taxes on property, such as cities, junior college districts, hospital districts, and fire prevention districts, have more options in granting tax abatements under section 312 of the Texas Tax Code. The only statutory limitation under section 312 is that agreements can be for periods of time no longer than ten years.⁵⁵ Counties will generally either grant a full 100% abatement for the ten years and receive a PILOT in return, or counties will offer a simple percentage reduction off the taxes due.

While the validity of wind farm tax abatements by school districts was recently upheld by one Texas attorney general opinion,⁵⁶ in early 2008 the legality of tax abatements issued by counties came into question. Sterling County requested an attorney general's opinion because one of the county commissioners was also one of the landowners whose land was

Practical Guide to How They Work and How to Draft Them, 2008 WIND ENERGY INST. 20 (Univ. of Tex. Sch. of Law Continuing Legal Educ.); Shannon H. Ratliff, II, *County Tax Abatements & School District Limitations on Appraised Value: Recent Attorney General Opinions & Legislative Outlook*, 2009 WIND ENERGY INST. 12 (Univ. of Tex. Sch. of Law Continuing Legal Educ.); Wetsel & Carmichael, *supra* note 52, at 20–29.

54. See TEX. TAX CODE ANN. § 313.025, .027 (Vernon 2008).

55. *Id.* § 312.007.

56. Op. Tex. Att'y Gen. No. GA-0665 (2008).

under a wind lease that was part of the wind project trying to obtain a tax abatement.⁵⁷ Before answering the conflict question, however, the attorney general opinion chose to analyze whether a tax abatement could even be granted to a wind farm. The opinion construes § 312.402(a) of the Texas Tax Code and finds that counties may only execute tax abatements with owners of taxable real property for such real property and the fixtures and improvements on the real property, but not for improvements owned by a lessee.⁵⁸ Almost all wind farms are built on leased land, so when the opinion states that under existing state law commissioners courts do not have the authority to execute tax abatements for leasehold improvements on real property, the opinion is concluding that it is unlikely that a wind farm could qualify for a tax abatement from a county.⁵⁹ Although Texas attorney general opinions are merely persuasive authority, and although the analysis was dicta, this analysis caused serious concern and uncertainty in the wind industry. Based on this attorney general opinion, landowners in Taylor County filed a suit against the county commissioners and the county judge in 2008 to set aside the tax abatements that had been granted to Horse Hollow and other wind farms.⁶⁰ The plaintiffs filed a non-suit in July 2008 for what they claimed were procedural reasons and vowed to refile.⁶¹

As the 2009 legislative session approached, tax abatements for wind farms entered the news because of their impact on school finance. An article by an Associated Press writer titled “Texas Schools Get Millions From Wind Farm Deals” was published across the state in April 2009.⁶² It explained that school districts were agreeing to tax abatements with wind projects that saved the wind farm millions of dollars, and the school districts were then receiving PILOT payments that the school districts could keep for themselves instead of sharing with poorer schools throughout the state. Many were outraged and felt the school districts were cheating the system. The school districts fought back, calling the deals “a finder’s fee” and explaining, “We sacrificed a beautiful landscape for wind turbines to be built . . . because we could see what they could do financially for this school district.”⁶³

57. Op. Tex. Att’y Gen. No. GA-0600 (2008).

58. *Id.* at 4.

59. *Id.* at 4-5.

60. Rankin v. Comm’rs Ct. of Taylor County, Tex., No. 8387-D (350th Dist. Ct., Taylor County, Tex. Notice of Oral Hearing filed Aug. 1, 2008); Kyle Peveto, *In a Stir Over Wind Farms: Lawsuit Brought Against Taylor County Commissioners Court for Tax Abatements*, REPORTER NEWS, Apr. 28, 2008, available at <http://www.reporternews.com/news/2008/apr/28/in-a-stir-over-wind-farms/>.

61. Wetsel & Carmichael, *supra* note 52, at 19.

62. E.g., Danny Robbins, *Texas Schools Get Millions From Wind Farm Deals*, DALLASNEWS.COM, Apr. 3, 2009, <http://www.dallasnews.com/sharedcontent/APStories/stories/D97B6V6G1.html>.

63. *Id.* (quoting Sterling City School District Superintendent Ronnie Krejci).

Between the uncertainty caused by the attorney general opinion and the public concern about schools cheating the system, it became clear it was time for the Texas Legislature to act. In June 2009 House Bills 3676 and 3896 were passed. The legislature clarified that tax abatements and value limitations by counties and school districts under §§ 312 and 313 of the Tax Code were authorized for improvements constructed by lessees such as wind developers.⁶⁴ Further, the legislature showed clear intent that school districts are doing nothing wrong as the school tax limitation program was extended for three years with no significant changes.⁶⁵

III. PROPERTY RIGHTS IN WIND⁶⁶

It is clear the Texas Legislature is supportive of promoting wind energy in Texas. Historically, the State of Texas has also been strongly supportive of individual property rights. Texas has a long history of dealing with issues that have arisen between surface owners and mineral owners in the context of oil and gas law. Similar issues will arise between surface owners, mineral owners, and owners of “wind rights” as a result of the growth of wind energy. The following analysis explores how other areas of the law may influence the creation of Texas wind law as it relates to property rights in analyzing the question of what happens when such conflicts arise.

A. Severance of Wind Rights

One such question is: Can a landowner sever wind rights from the rest of his ownership? No one doubts that a landowner can execute a binding wind lease. The severance issue is raised by deeds that have been executed in west Texas, the Panhandle, other parts of the state, and in other states where wind farms are providing major sources of income to landowners. In Texas these deeds often treat wind rights in much the same way that oil and gas are treated, and they purport to convey or reserve rights in wind apart from other incidents of land ownership. The validity of such provisions is certain to be challenged. Although many wind companies operating in Texas obtain and record a memorandum from the owner of the underlying fee acknowledging the validity of the wind lease executed by the owner of the wind rights, at some point the owner of the surface will refuse to execute such an instrument. This will most probably occur when the original grantor of wind rights or the grantee of land in which wind rights were reserved has died and his or her

64. Tex. H.B. 3676, 81st Leg., R.S. (2009); Tex. H.B. 3896, 81st Leg., R.S. (2009).

65. Tex. H.B. 3676, 81st Leg., R.S. (2009).

66. Portions of this section are based on Ernest E. Smith, *Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories*, 2010 WIND, SOLAR & RENEWABLES INST. 14 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

heirs or devisees refuse to sign the memorandum and insist that they, as owners of the fee in the surface, are the only parties who have the right to execute surface leases, including wind leases.

Few states have any legal authority with respect to the validity of wind severances. South Dakota has enacted legislation that invalidates the severance of wind energy rights for “the production or potential production of energy from wind power” except by a lease for no longer than 50 years.⁶⁷ Colorado, on the other hand, as of May 2010, had a pending bill providing that “the wind interest” is owned by the owner or owners of the surface and “is a property right that can be severed from the surface ownership”; if severed, the wind interest is subject to the same doctrines governing devises, inheritance, mortgages, and the like as other estates in land.⁶⁸ Conveyancing is done “in the manner provided by law for the transfer of mineral interests in real property.”⁶⁹ Some other states have statutes setting out requirements for the creation of wind easements, but their language suggests that they were enacted with reference to wind preservation easements, as discussed below, rather than severances of rights to develop the wind resources.⁷⁰ Only California has a case, *Contra Costa Water District v. Vaquero Farms, Inc.*, directly ruling on the issue.⁷¹ It upholds a severance, but in the specialized context of an eminent domain proceeding.⁷²

There is no legal precedent in Texas either supporting or rejecting the validity of a severance of wind rights. Invalidation would render multiple deeds and devises void. Upholding the severances would raise a set of issues analogous to those that the courts have been wrestling with in oil and gas law for almost 100 years, including implied rights and accommodation of conflicting uses.⁷³

There are several places where a Texas court or litigant could look for guidance on the validity of a severance. One is to the *Contra Costa* case. The case was an eminent domain proceeding in which a water district condemned land subject to several wind leases but provided that the

67. S.D. CODIFIED LAWS § 43-13-19 (1996). The statute further specifies that a lease of wind energy rights automatically terminates at the end of five years if no development has occurred. *Id.*

68. H.R. 10-1158, 67th Gen. Assem., 2d R.S. (Co. 2010) (amending CO. REV. STAT. § 38-32-102 (2007)).

69. *Id.*

70. See, e.g., KAN. STAT. ANN. § 58-2272 (2009) (requiring a description of the property subject to the easement and of the property that was benefitted by the easement, as well as a description of the vertical and horizontal angles and distances from the wind power system in which wind obstructions are prohibited).

71. 68 Cal. Rptr. 2d 272 (Ct. App. 1997).

72. *Id.* at 273.

73. For further discussion of the severance of wind rights, see generally Lisa Chavarria, *The Severance of Wind Rights in Texas*, Presented at the Review of Oil and Gas Law XXIII (Sept. 11-12, 2008), available at [http://www.sbaustinlaw.com/library-papers/Chavarria-The_Severance_of_Wind_Rights%20\(Final\).pdf](http://www.sbaustinlaw.com/library-papers/Chavarria-The_Severance_of_Wind_Rights%20(Final).pdf).

landowner retained “all rights for wind energy power conversion and the transmission of power generated by wind.”⁷⁴ The landowner demanded compensation for the full fee interest in the land, not just its value absent the wind rights. Vaquero Farms’ argument was based primarily on the proposition that there was no precedent for a wind severance.⁷⁵ The court, however, phrased the issue as whether wind power rights can be severed “[w]hen a public entity acquires property through eminent domain.”⁷⁶ The court’s affirmative answer to the question was based on “well-established California eminent domain law” that permits any entity authorized to acquire property for a particular use by eminent domain “to acquire any interest in property necessary for that use,” no matter how limited or unusual the interest might be.⁷⁷ Although the case is authority for the validity of a severance, its value as precedent for a severance between private parties is limited because of the specialized context in which it was decided.

Turning to Texas law, there are at least four bodies of law dealing with moving substances that a court faced with the severance issue might consider. In two of these, grants of fees have been recognized. Diffused and percolating subterranean waters are considered the property of the owner of the surface estate,⁷⁸ even though such water is subject to the rule of capture.⁷⁹ The validity of a deed provision severing rights in groundwater was upheld in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*.⁸⁰ The San Antonio District Court of Appeals cited several Texas Supreme Court cases for the “absolute ownership theory” of Texas groundwater and drew the conclusion that a grantor can reserve all groundwater rights when it conveys the remainder of the fee.⁸¹

Oil and gas law is another possibility. Like wind, oil and gas cross property lines in accordance with pressure differentials. Although oil and gas are subject to the rule of capture,⁸² they are deemed owned in fee simple absolute,⁸³ and severances of oil and gas from the remainder of the fee have been recognized by Texas courts for decades.⁸⁴ However, the

74. *Contra Costa*, 68 Cal. Rptr. 2d at 275.

75. *Id.*

76. *Id.* at 276.

77. *Id.*

78. *See, e.g., Pecos County Water Control & Improvement Dist. No. 1 v. Williams*, 271 S.W.2d 503, 504 (Tex. Civ. App.—El Paso 1954, writ ref’d n.r.e.) (“[T]he landowner owns the percolating water under his land . . .”).

79. *Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 81 S.W. 279, 280–81 (1904).

80. 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied).

81. *Id.* at 617–18 (citing such cases as *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.*, 576 S.W.2d 21, 25–27 (Tex. 1978); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972); *Texas Co. v. Burkett*, 117 Tex. 16, 28–29, 296 S.W. 273, 278 (1927)).

82. *See, e.g., Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 13 (Tex. 2008).

83. *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915).

84. *See, e.g., Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 260, 254 S.W. 296, 302 (1923).

analogy to oil and gas has been rejected both by commentators⁸⁵ and a New Mexico federal district court.⁸⁶ The New Mexico case involved a dispute over partition in kind of a section of land. Opponents of the partition argued that that the property could not be equitably divided in kind because its principal value was for development of a wind farm, and “wind power rights, like mineral rights, are not capable of being partitioned” in kind.⁸⁷ In ruling in favor of the partition the judge stated that “the right to ‘harvest’ wind energy is, then, an inchoate right which does not become ‘vested’ until reduced to ‘possession’ by employing it for a useful purpose. Only after it is reduced to actual wind power can wind energy then be severed and/or quantified.”⁸⁸

Rejection of the theory that the wind blowing across land can be owned prior to conversion to electricity does not negate the possibility of severance by deed or will. Wind is roughly analogous to flowing water⁸⁹ and wild animals in that all usually can and often do move across property lines. There is ample case law supporting leases, grants, and contracts dealing with the transfer of rights in flowing water rights in a natural water course and the right to hunt native game animals, even though both are deemed the property of the state. This is made clear with respect to flowing water by Texas Water Code § 11.021(a).⁹⁰ The same is true of native wild animals. This is both a common law doctrine and is made explicit by Texas Parks & Wildlife Code § 1.011(a), which provides that “[a]ll wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state.”⁹¹ This legal classification subjects both flowing water and game animals to regulation and limitations on a landowner’s right to take the water flowing across his land or to hunt animals on his land. It does not, however, preclude an owner of land where there is wild game or an owner whose land is crossed by a flowing stream from entering into an agreement authorizing a third party to exercise the landowner’s rights to harvest the game animals or remove some of the water.

85. See, e.g., Terry E. Hogwood, *Against the Wind*, TEX. OIL, GAS & ENERGY RESOURCES L. SEC. REP., Dec. 2001, at 6; Jack Howell, *Is there a Permanently Severable “Wind Estate” in Texas?*, SPROUSE SHRADER SMITH PC, Apr. 24, 2009, <http://taxlaw.sprouselaw.com> (follow “Topics” then “Wind Energy”) (last visited May 10, 2010).

86. *Romero v. Bernell*, 603 F. Supp. 2d 1333 (D.N.M. 2009).

87. *Id.* at 1334 (quoting Respondents.)

88. *Id.* at 1335 (footnote omitted).

89. One commentator has suggested that flowing water bears a closer physical similarity to wind than anything else. See Howell, *supra* note 85. For a criticism of applying water law regimes to wind, see K.K. DuVivier, *Animal, Vegetable, Mineral—Wind? The Severed Wind Power Rights Conundrum*, 49 Washburn L.J. 69, 95–97 (2009).

90. TEX. WATER CODE ANN. § 11.021(a) (Vernon 2008); see also *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785, 786–87 (1925) (defining natural watercourse).

91. TEX. PARKS & WILDLIFE CODE ANN. § 1.011(a) (Vernon 2002); see also *Hollywood Park Humane Soc. v. Town of Hollywood Park*, 261 S.W.3d 135 (Tex. App.—San Antonio 2008, no pet.).

For example, hunting leases are quite common and can be enforced against the lessor.⁹² The principal case on the validity of a grant or agreement to extract and use flowing water is *Texas Co. v. Burkett*.⁹³ The contract at issue included the right to draw water from the ordinary flow of a frequently dry river, as well as to the storm and flood waters of the river, the underground flow of the river beneath surface sand and gravel, and percolating waters collected either at springs or by excavations on the river banks down to the water table.⁹⁴ The Texas Supreme Court upheld the agreement over the objection that a grant of water in which the grantor had no ownership was void.⁹⁵

If wind, like native wild animals and water flowing in a natural watercourse, is a natural resource owned by the state, a severance of wind rights in fee simple would presumably be a nullity. It is conceptually difficult to justify the grant of such an estate in something owned by the state. On the other hand, a right in the nature of an easement in gross finds ample support in language of cases dealing with hunting leases.⁹⁶ Unlike the more common easement appurtenant, which is imposed upon one tract of land for the benefit of another tract, an easement in gross, as described by a Texas court, “attaches to an individual and is not dependent upon the existence of a dominant estate in land.”⁹⁷ Texas courts have used this terminology and the more technical legal term, *profit a prendre*, to describe the interest transferred by the right to hunt game animals on the grantor’s land.⁹⁸ The incidents of such an interest are set out in *Bland Lake Fishing & Hunting Club v. Fisher*, which involved a controversy over the extent to which the shareholders of a defunct fishing and hunting club succeeded to the hunting, fishing, and trapping rights granted to the corporation.⁹⁹ The court ruled that the shareholders could assert the same rights that the club had received, but could not enlarge those rights by building individual personal boathouses or camp houses.¹⁰⁰ The court stated:

All parties agree that the interest acquired by the grantee under the above conveyance was a *profit a prendre*. A right to *profits a prendre* is a right to take a part of the soil or product of the land of another.

92. *E.g.*, *Uzzell v. Hoggett*, 430 S.W.2d 846 (Tex. Civ. App.—San Antonio 1968, writ ref’d n.r.e.).

93. 117 Tex. 16, 296 S.W. 273 (1927).

94. *Id.* at 274–75.

95. *Id.* at 280.

96. *See, e.g.*, *Uzzell*, 430 S.W.2d 846; *Bland Lake Fishing & Hunting Club v. Fisher*, 311 S.W.2d 710 (Tex. Civ. App.—Beaumont 1958, no writ); *Anderson v. Gipson*, 144 S.W.2d 948 (Tex. Civ. App.—Galveston 1940, no writ).

97. *Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 666 (Tex. App.—Austin 2005, no writ).

98. *See, e.g.*, *Uzzell*, 430 S.W.2d 846; *Anderson*, 144 S.W.2d 948.

99. 311 S.W.2d 710.

100. *Id.* at 716–17.

It is distinguishable from a pure easement; is assignable or inheritable, if in gross It is more than a personal license. It is assignable and inheritable but it cannot be enlarged or subdivided by grant.¹⁰¹

Such cases support the severance of wind rights in the form of an easement in gross or profit a prendre, even if wind rights belong to the state. Use of the easement or profit would, of course, be subject to state regulation, just as there are limitations on the amount of water that can be extracted from a flowing water course and hunting is subject to regulations promulgated by the Texas Department of Parks & Wildlife.

If wind is simply unowned, rather than a natural resource owned by the state, Texas courts would need to look no further than the oil and gas law of two neighboring states for support for the proposition that a perpetual easement or profit can be granted in an unowned substance. Oklahoma,¹⁰² Louisiana,¹⁰³ and many other states,¹⁰⁴ including California,¹⁰⁵ deem oil and gas unowned until reduced to possession, but recognize that a landowner can sever the right to explore, drill, and produce from the remainder of the fee. The recipient of such a severance receives the exclusive right to search for and produce the hydrocarbons.¹⁰⁶ Although the type of estate transferred is dependent on the language used, many, and possibly most, grants, devises, and reservations that refer to “wind rights” or use similar language may be susceptible to a construction that results in a profit or easement in gross. Somewhat similarly, there is oil and gas case law in the non-ownership jurisdictions supporting the validity of grants or reservations of specific financial benefits associated with wind leases.¹⁰⁷

B. Conflicting Surface Uses

Like the validity of wind severances, conflicting claims of rights to surface uses will ultimately give rise to litigation. There are at least two potential sources of such conflicts: (1) those between the wind farm and oil and gas companies and (2) those between the wind farm and the surface owner or his other surface lessees.

In much of the Panhandle and west Texas, wind farms either already exist or are being built on land where the mineral rights were severed

101. *Id.* at 715.

102. *Rich v. Doneghey*, 177 P. 86 (Okla. 1918).

103. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207 (La. 1922).

104. See 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 2.4 (1987 & Supp. 2009).

105. *Gerhard v. Stephens*, 442 P.2d 692 (Cal. 1968); *Callahan v. Martin*, 43 P.2d 788 (Cal. 1935).

106. E.g., *Gerhard*, 442 P.2d at 705. See generally *Martin*, 43 P.2d 788.

107. E.g., *Carroll v. Bowen*, 68 P.2d 773 (Okla. 1937).

from the surface rights prior to execution of the wind lease. In this situation the wind lessee is logically in essentially the same legal position as an agricultural lessee. Because the mineral estate is dominant, an agricultural lessee whose interest was created after the severance of the mineral estate has no right to prevent oil and gas operations that interfere with his ranching or farming operations.¹⁰⁸ There is even some authority for the proposition that a company receiving an oil and gas lease subsequent to that of an agricultural lessee has priority over the agricultural lessee.¹⁰⁹ The underlying theory is that the agricultural lessor retained the mineral rights, which remained the dominant estate.

A contrary theory has, however, been advanced—i.e., that rights in wind, which is a natural resource, are more closely analogous to mineral rights and should be treated as such.¹¹⁰ Although courts use a variety of doctrines in dealing with a situation where there have been severances of rights in different minerals,¹¹¹ the most typical method is application of the traditional common law doctrine of “first in time; first in right.”¹¹² Under this approach, a wind lessee would have priority over a subsequent oil and gas lessee in controversies over location of turbines, drilling rigs, roads, and other matters.

By careful drafting the same or similar result can be reached without the aid of the wind-as-equivalent-to-minerals theory if the landowner still owns the mineral rights and the land is not subject to an oil and gas lease when the wind lease is executed. Specific language in the wind lease can make the location and timing of operations of subsequent oil and gas lessees—and perhaps the lease itself—subject to the approval of the wind lessee. Alternatively, the wind lease could require a lessor who still owns the mineral rights and later enters into an agreement with any future oil and gas lessee to require the oil and gas lessee to accommodate the needs of the wind company.

If a wind lessee is accorded the same legal status as an agricultural lessee and there is no specific agreement regarding the obligations of an oil and gas lessee, the latter as holder of the dominant estate may be able to conduct drilling operations that have an adverse impact on wind conditions and the operation of wind turbines; moreover, the placement and even use of roads and electric lines by the wind company may have to

108. See ERNEST E. SMITH & JACQUELINE WEAVER, TEXAS LAW OF OIL & GAS § 2.3 (2d ed. 1998 & 2009 updates).

109. See *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980); *Mobil Pipe Line Co. v. Smith*, 860 S.W.2d 157 (Tex. App.—El Paso 1993, writ *dism'd w.o.j.*).

110. *DuVivier & Wetsel*, *supra* note 1, at 9-27 to 9-28.

111. *Id.* at 9-26.

112. GERALD J. SHISSLER ET AL., 6 AM. LAW OF MINING § 200.4[2][2][i] (2d ed. 2008).

give way to the needs of the oil and gas lessee.¹¹³ If, however, the wind farm already exists when oil and gas development begins under a pre-existing oil and gas lease, the wind lessee can assert the accommodation doctrine. The doctrine requires the oil and gas lessee to accommodate existing surface uses if it is reasonably possible to do so. The wind company cannot require a method of accommodation unless it is consistent with industry practices, and it cannot require the oil and gas company to conduct operations off the lease premises.¹¹⁴

As *Texas Genco, LP v. Valence Operating Co.* illustrates, however, current industry practices include operations such as horizontal or deviated drilling that allow a well to be bottomed some distance from the drilling rig and associated structures, and the accommodation doctrine may require use of such a technique.¹¹⁵ The plaintiff in *Texas Genco* produced electricity for sale and burned lignite to generate the electricity. It challenged the defendant's right to drill in a 450-acre industrial landfill that the plaintiff used to dispose of the waste lignite ash. Disposal in the landfill was done by permit from the Texas Commission on Environmental Quality ("TCEQ"). The TCEQ required the ash deposits, which contained heavy metal, to be in clay-lined pits or "cells" in a mound that was uniformly shaped in a way that would permit rainwater runoff without pollution. The defendant's proposed well, accompanying road, and infrastructure would be at a site on the landfill that plaintiff would not use for waste ash disposal for several years. However, the drilling and roads to the site would require the plaintiff to reconfigure the location, shape, height, and grade of a significant portion of the already configured landfill in order to comply with environmental regulations. This reconfiguration would significantly reduce the amount of lignite ash plaintiff could dispose of in the landfill in the future.¹¹⁶

The Waco Court of Appeals relied on the accommodation doctrine in upholding the lower court's injunction against drilling on the landfill. It ruled that plaintiff's evidence supported the proposition that directional drilling from a site on the periphery of the lease was a reasonable alternative that was well within industry-accepted operations, even though it would be significantly more expensive than direct drilling from

113. For a more in depth discussion from the wind farm's point of view, see Becky H. Diffen, Note & Comment, *Energy From Above and Below: Who Wins When a Wind Farm and Oil & Gas Operations Conflict?*, 3 TEX. J. OIL GAS & ENERGY L. 240 (2008). For a more in depth discussion from the oil and gas operator's point of view, see Thomas J. Forestier, *Oil, Gas & Wind? Making Room for Everyone*, 35 ERNEST E. SMITH OIL, GAS & MINERAL LAW INST. 5 (Univ. of Tex. Sch. of Law Continuing Legal Educ. 2009).

114. See *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); SMITH & WEAVER, *supra* note 108, § 2.1[B][2][b].

115. 255 S.W.3d 210, 213 (Tex. App.—Waco 2008, no pet.).

116. *Id.* at 214.

the landfill itself.¹¹⁷ From the standpoint of a wind farm, it is also noteworthy that the court viewed the landfill as an existing use, even though there were no cells for depositing lignite ash in the area that defendant wanted to use and no deposits would be made in the area for at least five years.¹¹⁸ Although certainly not determinable of the issue, *Texas Genco* might provide support for applying the accommodation doctrine if proposed oil and gas drilling would preclude completion of a wind farm where the necessary infrastructure was already in place, but wind turbines had not yet been erected in the area where drilling or other oil and gas operations were proposed.

A far better solution to the oil company–wind farm conflict than either unyielding insistence by the former on the dominant estate doctrine or reliance on the accommodation doctrine by the latter is an accommodation agreement between the two parties. Setting out important details, such as the location of each company’s operations, obviously will be extraordinarily difficult if neither has yet commenced operations and the location of turbines, drilling, and the infrastructure connected with both types of operations is still uncertain. Nonetheless such an agreement, which at an absolute minimum could require consultation and a good faith effort to reach an agreement on such matters when operations actually commence, are an obvious and highly desirable way to promote continuing good workable relationships between two parties that will both be engaged in operations on the land for a lengthy period. Indeed, many (but unfortunately not all) wind companies and oil and gas companies attempt to enter into such agreements.

A second potential area of conflict will arise from the relationship between the surface owner and a wind lessee. North Dakota deals with this type of situation by statute. The statute specifies that a wind energy lease:

Must preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement. When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility’s business operations to allow the construction and operation of the wind energy facility.¹¹⁹

Of course, the parties may wish to set out their respective rights and obligations in more detail in the lease than the general mutual

117. *Id.* at 215–17.

118. *See id.* at 218–19.

119. N.D. CENT. CODE § 17-04-06(1)(d) (2009).

accommodation requirement set out in the statute. The same is true in Texas if the surface owner also owns the wind rights or is asked to ratify a wind lease before the company is willing to undertake operations.

In the absence of an accommodation agreement there are at least two bodies of law a court might look to in resolving competing claims to surface use. The first is the very considerable body of law resolving conflicts between surface owners and oil and gas lessees, discussed above. Application of these doctrines not only would give the surface owner the benefit of the accommodation doctrine, but also would require a judicial conclusion that wind, as a natural resource, is sufficiently similar to oil, gas, and other minerals, so it should be deemed the dominant estate, at least with respect to the surface. Although there are long strings of cases in common law jurisdictions¹²⁰ and centuries of authority under civil law¹²¹ for according that position to the mineral estate, there is no judicial authority for extending that position to wind.¹²² Moreover, the dominant estate doctrine is becoming increasingly controversial as the value of the surface estate steadily increases. It has been somewhat eroded in several states by enactment of surface compensation acts. These statutes, which differ significantly from state to state, often require an oil and gas company to notify the surface owner prior to beginning operations and to attempt to negotiate an agreement for payments for surface use and damage. In many instances, of course, this agreement includes a specification of where the drilling, road, and other infrastructure will be located. The acts provide a procedure for determining compensation if no agreement can be reached.¹²³

A second and arguably more relevant body of law is traditional landlord–tenant law. Under this body of law a lessee that is not in default is entitled to the exclusive use and possession of the leased premises for the duration of the lease term, and the lessor has no right to enter the premises unless there is express authorization in the lease agreement.¹²⁴ If courts hold these doctrines applicable to wind leases, the lessor’s right of concurrent use of the space leased will be limited to the express contractual conditions that the lessor includes in the lease. This includes

120. For a representative sampling of Texas cases, see *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Petty v. Winn Exploration Co.*, 816 S.W.2d 432 (Tex. App.—San Antonio 1991, writ denied); *Stradley v. Magnolia Petrol. Co.*, 155 S.W.2d 649 (Tex. Civ. App.—Amarillo 1941, writ ref’d); *Gregg v. Caldwell-Guadalupe Pick-up Stations*, 286 S.W. 1083 (Tex. Comm’n App. 1926).

121. See, e.g., *Sun Oil Co.*, 482 S.W.2d at 816–17 (Daniel, A. J., dissenting) (discussing Spanish civil law).

122. See *DuVivier & Wetsel*, *supra* note 1.

123. See, e.g., JOHN S. LOWE ET AL., *CASES AND MATERIALS ON OIL & GAS LAW* 323 (5th ed. 2008); Norman D. Ewart, *State Surface Access and Compensation Statutes*, 54 ROCKY MTN. MIN. L. INST. 4-1 (2008).

124. *Brown v. Johnson*, 118 Tex. 143, 12 S.W.2d 543, 545 (1929); *De Leon v. Creely*, 972 S.W.2d 808, 813 (Tex. App.—Corpus Christi 1998, no writ).

all space that the wind company has not released, such as the space around, but not actually occupied by the wind lessee's turbines, that the wind company has retained in order to make sure there is no interference or disturbance with the turbines, roads, and other installations.

C. Wind Protection Easements and the Rule of Capture

A newly emerging issue is how to protect the flow of wind from adjacent, up-wind property. In any given area wind typically blows from a predominant direction. In much of west Texas the wind blows from the southeast the majority of the time. When a landowner negotiates a wind lease, the wind company often obtains an option period in which it erects a meteorological tower to determine if the wind speed from the predominant wind direction averages over 13 miles per hour and is within the necessary range of low and high wind speeds for approximately 40% of the time. Wind turbines, like old water windmills, shift to face whatever direction the wind is blowing from, but the wind company is principally interested in the prevailing direction of the wind flow and the wind speed and its constancy from that direction.

One matter of potential concern to a company planning a wind farm is that no structures or other objects that would affect wind flow at the height of the blades on its turbines are erected on the land immediately upwind. Another wind farm with a row of turbines on or near the boundary would unquestionably have this effect. A wind turbine significantly affects downwind flow and turbulence for some distance. If a company erects a wind farm on land where the predominant wind flow is from the southeast and places a row of wind turbines close to the northwestern boundary of the property, the row will effectively preclude any wind turbines from being erected within a considerable distance—perhaps half a mile—on the adjacent property to the northwest.

One way to prevent a wind farm or other disruptive structures on the upwind land is to obtain a “wind protection” or “wind non-obstruction” easement or a real covenant prohibiting wind turbines and other tall structures within a specified distance of the boundary. Several states have enacted statutes dealing with this type of easement. An Oregon statute defines a “wind energy easement” as an easement or covenant “designed to insure the undisturbed flow of wind across the real property of another,”¹²⁵ and it states that such an easement “shall be appurtenant to and run with the real property benefited and burdened by the easement.”¹²⁶ It requires a description of the easement's horizontal and vertical space on the burdened property and the restrictions on structures

125. OR. REV. STAT. § 105.900 (2009).

126. *Id.* § 105.905(1).

and other objects that would disrupt the wind flow across the burdened property.¹²⁷ South Dakota's statute also sets out the requirements for this type of easement, which it defines as "a right, whether or not stated in the form of a restriction, easement, covenant, or condition . . . for the purpose of ensuring adequate exposure of a wind power system to the winds."¹²⁸ It requires a description of the lands burdened and benefitted by the easement and, like the Oregon statute, a description of the easement's dimensions, including the vertical space above the land burdened by the easement. The South Dakota statute apparently contemplates that the easement will be acquired in conjunction with a wind lease on the land to which it is appurtenant, for it states that the easement is void "if no development of the potential to produce energy from wind power" occurs on the benefitted land within five years of the grant of the easement.¹²⁹ The statute requires annual payments to the grantor and limits such easements to a term of no more than 50 years.¹³⁰ Other states specifically authorizing wind protection easements include Kansas¹³¹ and North Dakota.¹³²

In the absence of a statute, an easement to protect the wind flow from adjacent property seems sufficiently analogous to the old common law easement for light and air that most jurisdictions would presumably recognize its validity. Other rights in airspace, including navigation easements¹³³ and rights in condominiums above ground level, are also widely recognized, although the latter are by statutory authority rather than common law decision. Alternatively, a restrictive covenant could be used. A covenant imposing restrictions on how close to the boundary wind turbines or other structures can be erected is virtually identical in purpose with the traditional set-back requirements imposed on houses and other structures by residential subdivision covenants. Either method of protecting the wind flow would, of course, have to comply with the state's requirements for such legal devices. For example, an easement to preserve wind flow from adjacent lands would have to comply with the state's statute of frauds with respect to both the burdened and benefitted land and should describe not only the length and depth of the easement but also the vertical space above the surface that is subject to the easement. Ideally the instrument should also specify the types of

127. *Id.* § 105.910(1).

128. S.D. CODIFIED LAWS § 43-13-16 (2004 & Supp. 2009).

129. *Id.* § 43-13-17.

130. *Id.*

131. See KAN. STAT. ANN. § 58-2272 (2005).

132. See N.D. CENT. CODE §§ 17-04-02, 17-04-03 (2009).

133. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

restrictions on buildings, earthen constructions, and other structures that cannot be erected within the space covered by the easement.

Such legal devices may be desirable even in many of the states that regulate wind turbine spacing either through their public utility commission¹³⁴ or by county ordinance.¹³⁵ Although ordinances or regulations often establish set-back requirements for wind turbines, the required set-back, which may be only slightly more than the height of the turbine, is often designed to protect the integrity of structures on adjacent land rather than to prevent disruption of wind flow to an existing or prospective wind farm. In Texas even this type of spacing regulation is limited to local ordinances.¹³⁶

In the absence of a wind preservation easement, covenant, or extensive regulatory spacing requirements, a wind farm faced with the prospect of a competing wind farm on the upwind tract must deal with a variant of an issue familiar to oil and gas companies and their attorneys: the rule of capture. Can a wind company *capture* the wind that would otherwise turn the blades on wind turbines on the adjacent downwind land?

Although the answer at this point is entirely conjectural, it seems unlikely that a Texas court would restrict the ability of a wind farm to interfere with wind flow to adjacent land. As discussed above, a Texas court dealing with the validity of a severance might look to wild animal law, water law, or oil and gas law for analogies. All of these bodies of law support the rule of capture. A landowner hunting on his own land can legally shoot a whitetail deer just as it is preparing to jump the fence onto neighboring land,¹³⁷ and the rule of capture has been firmly entrenched in case law dealing with percolating underground water¹³⁸ and oil and gas¹³⁹ for many decades.

IV. OPPOSITION TO WIND FARMS

Perhaps the most significant recent development in the wind industry—and one with strong negative implications for wind development—is the rapidly increasing popular opposition to wind farms.¹⁴⁰ In Texas, as in almost every other state where there has been

134. *E.g.*, N.D. ADMIN. CODE 69-06-08-01 (2009); VT. STAT. ANN. tit. 30, § 248 (2008). In reviewing a siting decision of a commission or other regulatory body, the decision is generally granted great deference by the court. *See, e.g.*, *In re UPC Vermont Wind, LLC*, 969 A.2d 144 (Vt. 2009).

135. *See, e.g.*, *Roberts v. Manitowoc County Bd. of Adjustment*, 721 N.W.2d 499, 530–31 (Wis. Ct. App. 2006) (discussing a county code).

136. *See, e.g.*, *City of Lamesa, Ordinance No. O-08-09*.

137. This statement assumes that the landowner has a valid hunting license, has not exceeded his bag limit, and is hunting during proper season.

138. *See Houston & Tex. Cent. R.R. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904).

139. *See SMITH & WEAVER, supra* note 108, § 1.1.

140. *See, e.g.*, Kristin Choo, *The War of the Winds*, 96 A.B.A.J. 54 (2010).

large scale actual or proposed wind development, the most controversial issue, and almost the only one that has produced any litigation, is location. Wind energy is now the recipient of the same negative reaction as virtually every other system for producing and transmitting electricity: People want, need, and insist upon increasing amounts of electricity but are almost invariably strongly opposed to a power plant or high-power transmission line near where they live or vacation.

In states that have either state-wide or county-wide permitting regulations that apply to the siting of wind farms, the principal strategy used to attempt to stop the development of wind farms on ridges or other locations where they will be highly visible is homeowner intervention at the permitting level, accompanied by efforts to overturn agency decisions in favor of prospective wind farms. Case law regarding the permitting and regulation of wind farms, including siting and moratorium issues, has begun to appear across the country.¹⁴¹

The best known and longest-running permitting controversy involves a wind development called Cape Wind. Cape Wind is a proposed wind farm off Nantucket Sound in federal waters. There have already been two cases in state court, two cases in federal court, and well over a dozen administrative hearings—to say nothing of the well-publicized opposition by the late Democratic Senator Teddy Kennedy and former Massachusetts Republican governor Mitt Romney.¹⁴²

Texas currently has no state-wide or county-wide regulatory system applying to wind farms, though bills have been filed in the last two legislative sessions. In 2007 House Bill 2794 would have set up a permitting process administered by the TCEQ, but the bill failed to get

141. See, e.g., *Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149 (W.D.N.Y. 2006); *Bomba v. Zoning Bd. of Appeals of Town of Princeton*, No. 293552, 2005 WL 2106162 (Mass. Land Ct. Sept. 1, 2005); *Matter of Advocates for Prattsburgh, Inc. v. Steuben County Indus. Dev. Agency*, 48 A.D.3d 1160 (N.Y. App. Div. 2008); *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153 (Wash. 2008); *Roberts v. Manitowoc County Bd. of Adjustment*, 721 N.W.2d 499 (Wis. Ct. App. 2006); *In re UPC Vermont Wind, LLC*, 969 A.2d 144 (Vt. 2009); *Mountain Cmty. For Responsible Energy v. Pub. Serv. Comm'n of W. Va.*, 665 S.E.2d 315 (W. Va. 2008); *Burch v. Nedpower Mount Storm, LLC* 647 S.E.2d 879 (W. Va. 2007). For further discussion, see PATRICIA E. SALKIN, 4 AM. LAW ZONING § 37:9 (5th ed. 2009); Jennifer R. Adriano, *The Power of Wind: Current Legal Issues in Siting for Wind Power*, 61 PEL No. 5 P. 3 (2009).

142. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 288 F. Supp. 2d 64 (D. Mass. 2003); *Ten Taxpayers Citizen Group v. Cape Wind Assocs., LLC*, 278 F. Supp. 2d 98 (D. Mass. 2003). For an in depth discussion of the Cape Wind project, see Carolyn S. Kaplan, *Congress, the Courts, and the Army Corps: Siting the First Offshore Wind Farm in the United States*, 31 B.C. ENVTL. AFF. L. REV. 177 (2004); Ernest E. Smith, *Wind Energy: Siting Controversies and Rights in Wind*, 1 ENVTL. & ENERGY L. & POL'Y J. 281, 284-90 (2007); Matthew C. Heerde, Note, *Don't Need a Weatherman to Know Which Way the Wind Blows: What Does the Cape Wind Decision Foretell for the Offshore Wind Energy Industry?*, 17 GEO. INT'L ENVTL. L. REV. 253 (2005); Michael Schulz, Note, *Questions Blowing in the Wind: The Development of Offshore Wind as a Renewable Source of Energy in the United States*, 38 NEW ENG. L. REV. 415 (2004); Iva Žiža, Note, *Siting of Renewable Energy Facilities and Adversarial Legalism: Lessons from Cape Cod*, 42 NEW ENG. L. REV. 591 (2008).

out of committee.¹⁴³ This bill was strongly supported by the King Ranch. Fears of wind farms being built in the Hill Country led to the filing of several bills in 2009, but again the bills failed to gain traction.¹⁴⁴ At present, the location of wind turbines, like the oil derricks at Spindletop in 1901, is unregulated in Texas as long as the turbines are located on private land and outside of municipalities.

A. *Suits Alleging Common Law Nuisance*

In the absence of regulation, there have been two principal legal grounds for trying to stop wind farms in Texas. The first ground, nuisance, which is also being tried in several other states, has resulted in the most important Texas case on wind energy: *Rankin v. FPL Energy*.¹⁴⁵

Rankin v. FPL Energy was originally filed in 2005 in the 42nd Judicial District Court in Taylor County, Texas.¹⁴⁶ The plaintiff landowners sought both a temporary and permanent injunction against the construction and operation of the Horse Hollow Wind Energy Center, which they claimed was both a private and public nuisance. In addition to attempting to enjoin the operation of the project, the plaintiffs also sought to recover damages.¹⁴⁷

The Horse Hollow project was developed and is owned by FPL Energy and its subsidiaries (“FPL”). With three phases totaling 421 wind turbines and just over 735 MW, it is one of the largest wind farms in the world. Located in Taylor and Nolan Counties, the project spans over 47,000 acres about 20 miles south of Abilene. The turbines stand on 80-meter towers with a total height from the ground to the tip of the blade of up to 415 feet and generating capacities ranging from 1.5 MW to 2.5 MW per turbine.¹⁴⁸

The plaintiffs live on tracts of 100 to 700 acres in size.¹⁴⁹ They “sought out this scenic area that has always been a rural country setting because they wanted an escape from the noise, lights, and industrial atmosphere of city life.”¹⁵⁰ The wind turbines would range from 1,500 feet to 2.7 miles

143. Tex. H.B. 2794, 80th Leg., R.S. (2007).

144. Tex. S.B. 1226, 81st Leg., R.S. (2009); Tex. S.B. 1227, 81st Leg., R.S. (2009).

145. *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506 (Tex. App.—Eastland 2008, pet. denied).

146. *Rankin v. FPL Energy, LLC*, No. 46138-A (42nd Dist. Ct., Taylor County, Tex. Jan. 29, 2007).

147. Steven Baron, *New Meets Old: Wind Turbines and the Common Law of Nuisance*, 2008 WIND ENERGY INST. 17, at 1–2 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

148. NextEra Energy Resources, Horse Hollow I, II & III Wind Energy Center, <http://www.nexteraenergyresources.com/content/where/portfolio/pdf/horsehollow.pdf>. NextEra Energy was formerly known as FPL Energy.

149. Dana Childs, *Wind Energy Scores Major U.S. Victory*, CLEANTECH GROUP, Dec. 20, 2006, <http://cleantech.com/news/node/509>.

150. Brief of Appellants, Dale Rankin, et al. at 2, *Rankin*, 266 S.W.3d 506 (No. 11-07-00074-CV), 2007 WL 2220310.

in distance from their homes,¹⁵¹ but the turbines would be clearly visible from their homes and would stretch across virtually their entire viewsheds. The plaintiffs filed a Request for Injunctive Relief in February 2005 and, after its denial, sought a permanent injunction based on a nuisance claim.¹⁵²

As in the litigation over Cape Wind off Nantucket, and the other nuisance suits in Texas and elsewhere, the landowners' principal concern was the erection of a huge, industrial-like installation across previously pristine scenery and the reduction in their property values that would result. In nuisance suits, plaintiffs often proffer the definition provided by the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.*: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."¹⁵³ They argue that a huge wind farm is out of place in what would otherwise be an unspoiled scenic area that people visit to rest and relax and where people have moved to escape the noise and lights of the city.

This argument by itself, however, is insufficient as a basis for a cause of action. The objectionable use must not only be inappropriate for the area, but it also must create "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it."¹⁵⁴ In practice, the defendant's use must emit light, noise, odor, or pollutants that seriously interfere with neighbors' land use in order to constitute a common law nuisance. Flashing floodlights into the neighbor's windows; dust, lint, cotton burrs, and loud noises from a cotton gin; and foul odors, dust, noise, and bright lights from industrial plants are examples of problems emanating from adjacent uses that Texas courts have upheld as nuisances.¹⁵⁵ Texas courts, however, like those of most other states, have held that aesthetic objections by themselves are not a basis for a nuisance claim, regardless of a proven diminution in property values resulting from the objectionable use.¹⁵⁶

151. Robert D. O'Neal & Richard M. Lampeter, *Sound Defense for a Wind Turbine Farm*, N. AM. WINDPOWER, May 2007.

152. Brief of Appellants, Dale Rankin, et al. at 2-3, *Rankin*, 266 S.W.3d 506 (No. 11-07-00074-CV), 2007 WL 2220310.

153. 272 U.S. 365, 388 (1926).

154. *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003).

155. See *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004); *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 616 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lamesa Coop. Gin v. Peltier*, 342 S.W.2d 613 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

156. See, e.g., *Jones v. Highland Mem'l Park*, 242 S.W.2d 250, 253 (Tex. Civ. App.—San Antonio 1951, no writ); *Dallas Land & Loan Co. v. Garrett*, 276 S.W. 471, 474 (Tex. Civ. App.—Dallas 1925, no writ); *Shamburger v. Scheurrer*, 198 S.W. 1069 (Tex. Civ. App.—Fort Worth 1917, no writ). *But see In re Halnon*, 811 A.2d 161 (Vt. 2002) (upholding the Vermont Public Service Board's denial of a certificate of public good for a wind turbine because of its aesthetic impact).

In an attempt to introduce evidence of the ruined scenery, the *Rankin* plaintiffs argued that the adverse aesthetic impact should be considered as part of the package of problems caused by Horse Hollow. These included the red blinking lights at the tops of the turbines, the potential shadow-flicker effect when the sun rose or set behind a rotating turbine, and the noise generated by the turbines as they rotated.¹⁵⁷ The trial judge rejected this argument and granted FPL partial summary judgment on the aesthetic nuisance claim.¹⁵⁸

Since the plaintiffs could not introduce evidence of the negative impact on the scenery, the trial centered on whether the noise created by the wind turbines was sufficient to create a nuisance.¹⁵⁹ After almost 700 hours of measurements at 24 sites, including inside the homes of several plaintiffs, FPL found that the loudest noise from a wind turbine at any location was 44 decibels, which is about as loud as the wind itself blowing at 10 miles per hour.¹⁶⁰ Most measurements were substantially lower, and those taken a half-mile from the wind farm registered at 30 decibels while the turbines were in full operation during the day.¹⁶¹ A measurement taken at the same location with the turbines turned off at night registered ambient noise from crickets and other natural sounds at 35 decibels. The plaintiffs had failed to disclose their own expert's rebuttal testimony in advance, so they were unable to introduce testimony that under EPA standards a 55 decibel level is acceptable only in a city, whereas in a rural area 35 decibels is the loudest acceptable level. The jury voted 11-to-1 that the Horse Hollow project did not create a nuisance.¹⁶²

On appeal plaintiffs argued that the trial court's summary judgment barring aesthetic nuisance claims was improper because Texas law requires a fact specific decision for each nuisance case. In their brief, the plaintiffs claimed:

[I]t is not difficult to imagine that a case may exist where the aesthetic impact of some structure or structures might by itself be considered enough to constitute a nuisance. Texas courts retain the right to so rule, where structures of such magnitude and of little public value needlessly destroy scenic areas of the State¹⁶³

157. *Rankin*, 266 S.W.3d at 510.

158. *Id.* at 508.

159. Appellees' Brief at 6, *Rankin*, 266 S.W.3d 506 (No. 11-07-00074-CV), 2007 WL 2752779.

160. Childs, *supra* note 149.

161. Trey Cox, *In Defense of the Wind: Legal Challenges Facing Wind Power Can Be a Breeze with Proper Planning*, 2009 WIND ENERGY INST. 20, at 7 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

162. *Id.*

163. Brief of Appellants, Dale Rankin, et al. at 6, *Rankin*, 266 S.W.3d 506 (No. 11-07-00074-CV), 2007 WL 2220310.

Plaintiffs argued that nuisance law is dynamic and fact specific and thus must be evaluated on a case-by-case basis.¹⁶⁴ They also contended that the jury instruction regarding aesthetic nuisance was a misstatement of Texas law, along with appealing the exclusion of rebuttal witnesses.¹⁶⁵

FPL countered with Texas case law stretching back for almost 100 years that uniformly holds that aesthetic complaints cannot form the basis in whole or in part of a claim for nuisance.¹⁶⁶ Further, nuisance law in Texas avoids “pandering to men’s tastes.”¹⁶⁷ The Eastland Court of Appeals agreed and upheld the jury’s ruling in favor of the defendant. It ruled that aesthetics are not admissible as evidence of nuisance in virtually any circumstance in Texas.¹⁶⁸

Horse Hollow came online in 2005 and 2006 and now provides enough electricity to power approximately 220,000 homes.¹⁶⁹ Although FPL prevailed on what has been and probably will continue to be the principal objection to wind farms, the case and the Cape Wind controversy demonstrate the danger of unhappy neighbors. FPL had already spent \$2 million on legal fees as of early 2008, with more coming as the appeal progressed.¹⁷⁰ The amount spent to date by Cape Wind is almost certainly many times that amount.

Moreover, *Rankin* did not put an end to litigation based on nuisance claims. Another FPL wind project, the Wolf Ridge Wind Farm, was the subject of *O’Dell v. FPL Energy*, which was filed in Cooke County, Texas in September 2006.¹⁷¹ The landowner plaintiffs sought a temporary injunction¹⁷² as well as damages.¹⁷³ The nuisance complaint was based on noise and aesthetics, and the case was settled prior to trial.¹⁷⁴ Before settlement, FPL was granted partial summary judgment as the court dismissed “all claims of public and private nuisance asserted in whole or in part on the basis of any alleged aesthetic impact” of the wind farm.¹⁷⁵ A citizen’s advocacy group also was formed to oppose the wind project, and

164. *Id.* at 10–11.

165. *Id.* at 24–27.

166. Appellees’ Brief at 2, *Rankin*, 266 S.W.3d 506 (No. 11-07-00074-CV), 2007 WL 2752779.

167. *Id.* at 21.

168. *Rankin*, 266 S.W.3d at 512–13.

169. NextEra Energy Resources, *supra* note 148.

170. Trey Cox, *When Don Quixote Attacks*, 2008 WIND ENERGY INST. 17, at 10 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

171. Cause No. 06-502 (235th Dist. Ct., Cooke County, Tex.).

172. Andy Hogue, *Florida Power & Light Moving Ahead with Building Plans*, GAINESVILLE DAILY REGISTER, Dec. 18, 2007, available at <http://gainesvilleregister.com/homepage/x116022137/Florida-Power-Light-moving-ahead-with-building-plans?keyword=leadpicturestory>.

173. Andy Hogue, *Wind Generation Farm Getting Closer to Reality*, GAINESVILLE DAILY REGISTER, Apr. 14, 2008, available at <http://gainesvilleregister.com/local/x116022999/Wind-generation-farm-getting-closer-to-reality>.

174. Baron, *supra* note 147.

175. Order on Defendants’ Motion for Partial Summary Judgment Regarding Aesthetics, No. 06-502 (235th Dist. Ct., Cooke County, Tex. July 24, 2007).

the nearby city of Saint Jo enacted ordinances that prohibited the siting of wind turbines within city limits or extraterritorial jurisdiction.¹⁷⁶ Wolf Ridge Wind Energy Center began commercial operations in 2008.¹⁷⁷

Landowners in Jack County, Texas have also filed a nuisance suit. At issue was the proposed construction of a wind project by Gamesa Wind U.S. The plaintiffs claimed that noise, negative visual impact from blinking red lights at night, strobe and flicker effects at sunrise and sunset, damage to wildlife habitats from construction, and electromagnetic fields impacting their health made the wind farm a nuisance. Gamesa filed motions for partial summary judgment to eliminate aesthetic claims and to preclude evidence and arguments about wind development as misguided public policy. The court granted both motions, and the plaintiffs then filed a nonsuit.¹⁷⁸

With three failed nuisance suits in the state, and a strong court of appeals opinion that the Supreme Court of Texas denied review, this is one area of wind law that seems to be settled in Texas. As the first wind power case in the United States to go to a jury,¹⁷⁹ the *Rankin v. FPL* case sets a standard for wind farm nuisance, especially in the larger and more western states that share similar nuisance common law with Texas.

Cases also have arisen in a few other states.¹⁸⁰ Since a majority of states have precedents rejecting a nuisance cause of action based on aesthetics, it seems reasonably likely that future cases will be resolved in the same way as *Rankin* unless a court is willing to adopt the package argument rejected in that case, or a jury is truly convinced that the other factors by themselves constitute a common law nuisance serious enough to counterbalance the advantage of a “clean” industry that is strongly encouraged at both the federal and state level. (In this connection, one might note the intense opposition to drilling in the Barnett Shale in Fort Worth and surrounding suburban communities, which appears to continue unabated unless complainants can establish that the drilling location violates a Texas Railroad Commission regulation or zoning

176. Barbara Green, *Blowing in: Construction Begins on Wind Turbine Project in Cooke County*, TIMES RECORD NEWS, Feb. 3, 2008, available at <http://www.timesrecordnews.com/news/2008/feb/03/blowing-in/>.

177. Nextera Energy Resources, *Wolf Ridge Wind Energy Center*, <http://www.nexteraenergyresources.com/content/where/portfolio/pdf/wolfridge.pdf>.

178. *Black v. Gamesa Wind U.S., LLC*, Cause No. 06-0129 (271st Dist. Ct., Jack County, Tex.); see Baron, *supra* note 147.

179. Cox, *supra* note 161.

180. See, e.g., *Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879, 883 (W. Va. 2007) (“While unsightliness alone rarely justifies interference by a circuit court applying equitable principles, an unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances.”); *Bomba v. Zoning Bd. of Appeals of Town of Princeton*, No. 293552, 2005 WL 2106162, at *3 n.5 (Mass. Land Ct. Sept. 1, 2005) (“[A]esthetic considerations such as views are not considered proper evidence to establish standing unless a zoning by-law confers such status.”). But see *In re* Petition of Halnon, 811 A.2d 161, 163 (Vt. 2002).

ordinance.¹⁸¹) Thus, NIMBY (short for “not in my back yard”) opponents of wind farms must look for other causes of action to prevent the siting of wind farms in their areas.

V. ENVIRONMENTAL LITIGATION AND REGULATION

Opponents do not have far to look for a such a cause of action. Another popular basis for opposition to planned wind developments is their potential adverse environmental impact, which may be either direct or indirect. The principal direct impact is upon birds and bats. One of the first wind farms in the country is situated at Altamont Pass in California. It is located in a major raptor flyway and has concededly resulted in the deaths of several thousand hawks. In other less ill-chosen locations the number of bird deaths is much lower, but still may be significant. There is significant disagreement on this issue, but according to wind energy proponents, the number of birds killed is only about two annually per turbine.¹⁸² Bats (which have far fewer supporters than birds) are apparently much more likely to be killed than birds.¹⁸³ In fact, a federal district court has issued an injunction against the construction of a wind farm in Greenbrier County, West Virginia on the basis of evidence that it would result in a taking of an endangered species of bat in violation of § 9 of the Endangered Species Act.¹⁸⁴

The principal indirect impact on wildlife results from habitat disruption, especially when a wind farm covering thousands of acres is built in a previously relatively pristine, unfarmed area, such as most rangeland. Because the wind turbines are connected by roads, animals that need large, uninterrupted spaces attempt to move to other locations (which because of urbanization may no longer exist), and some grassland bird species that for evolutionary reasons perceive any tall structure as a perching point for red-tail hawks and other raptors also move or stop breeding. As a result of these issues, coupled with concern over the potential impact of migrating birds, the Coastal Habitat Alliance has filed a variety of lawsuits in Texas, and there is potential for regulation by the Fish and Wildlife Service.

181. See, e.g., Billie Ann Maxwell, Note & Comment, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337 (2008–2009).

182. See, e.g., Alyssa Kagel, *Do Wind Turbines Cause Bird Fatalities?*, PLENTY MAGAZINE, May 11, 2009, <http://www.mnn.com/earth-matters/energy/stories/do-wind-turbines-cause-bird-fatalities>; Mick Sagrillo, *Advice from an Expert: Putting Wind's Impact on Bird's in Perspective*, AWEA, 2003, <http://www.awea.org/faq/sagrillo/swbirds.html>.

183. See *Why Wind Turbines Can Mean Death for Bats*, SCIENCEDAILY.COM, Aug. 26, 2008, <http://www.sciencedaily.com/releases/2008/08/080825132107.htm>.

184. *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009). The order granting the injunction is available at <http://www.awionline.org/ht/a/GetDocumentAction/i/16992>. Section 9 of the Endangered Species Act is located at 16 U.S.C. § 1538(a)(1)(B) (2006).

A. *Private Litigation*

The Coastal Habitat Alliance, which is primarily composed of the King Ranch and several chapters of the Texas Audubon Society, has attempted to prevent the construction and operation of two large wind farms planned for the Kenedy Ranch in south Texas. The primary argument against the location of the wind farms is that they are in the migratory pathway of hundreds of species of birds that migrate north to south in the fall and back north in the spring. Typically these migratory flyways are above even the tallest of the wind turbines; however, during fogs or bad weather, the birds commonly fly much lower, where, it is feared, thousands will collide with the wind turbines. From the plaintiff's standpoint, the legal problem was finding some way to get involved in the process, which was particularly difficult in Texas since there is no regulation or required permitting for wind farms.

To date, the Coastal Habitat Alliance has used at least three methods of attacking the wind farms. Two have been unsuccessful and a third, discussed below, is still pending. The first, which was a suit in federal district court, was based on the location of the wind farms within the area of Texas subject to the Coastal Zone Management Act.¹⁸⁵

The Texas program under the Act designates the General Land Office as the lead agency and requires the Public Utilities Commission of Texas ("PUCT" or "Commission") to comply with specified energy-siting policies that minimize environmental damage. A review or consideration of the environmental and other impacts is to be made when the PUCT issued Certificates of Convenience and Necessity ("CCNs") to new electric-generating facilities within the coastal zone. However, when the Texas Legislature deregulated the utility industry, it also eliminated the requirement for a CCN for many electric-generating facilities, including the wind farms in question. Plaintiffs argued that Texas lacked the unilateral authority to eliminate the consistency review process, and that, instead, it was required to adhere to an amendment process set out in the Act. This process required at least one public hearing with public participation as well as approval by the appropriate federal agencies.¹⁸⁶ By failing to follow this procedure, plaintiffs argued the state had deprived them of their due process right to a hearing.

The court ruled for the defendants, primarily on the ground that plaintiffs lacked standing. It pointed out that the Act does not provide for a private right of action and that, in any event, the Alliance did not allege a concrete injury that was sufficient for standing purposes or establish

185. *Coastal Habitat Alliance v. Patterson*, 601 F. Supp. 2d 868 (W.D. Tex. 2008). The Coastal Zone Management Act is located at 16 U.S.C. §§ 1451–66 (2006).

186. 16 U.S.C. § 1455(e)(1), (3).

that the requested relief, if granted, would redress their alleged environmental injury from the wind farms.¹⁸⁷

B. Private Intervention in Regulation of Transmission Line Location

The second method utilized by the Coastal Habitat Alliance in its attempt to stop the wind farms in Kenedy County involved the one aspect of wind farms where there is regulation: the construction of electric transmission lines. The Alliance sought to intervene in American Electric Power Texas Central Company's application for a CCN for a Double Circuit Transmission Line in Kenedy County that would transmit the electricity generated by the wind farms.¹⁸⁸ The PUCT denied the Alliance's motion to intervene, and the denial was upheld in district court¹⁸⁹ and by the Austin Court of Appeals.¹⁹⁰ The appellate court ruled that the Texas Administrative Procedure Act does not authorize a non-party such as the Alliance to seek judicial review of a final order by the PUCT and that in any event denial of intervention was within the discretion of the PUCT.¹⁹¹

C. Potential Application of Federal Regulation

Although the Coastal Habitat Alliance has had no success to date in its efforts to stop the Kenedy County wind farms (both wind farms began commercial operations in 2009¹⁹²), there is significant potential for the application of federal environmental statutes and regulations.¹⁹³

187. *Coastal Habitat Alliance*, 601 F. Supp. 2d at 882.

188. Pub. Util. Comm'n of Tex., *The Coastal Habitat Alliance's Appeal of Order No. 5, Application of AEP TCC to Amend a CCN for a 345-KV Double Circuit Transmission Line in Kenedy County, Texas*, Docket No. 34298 (Sept. 17, 2007) (seeking CHA intervention in CCN for transmission line), available at http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34298_29_562538.PDF.

189. Pub. Util. Comm'n of Tex., *Order Denying Appeal of Order No. 5, Application of AEP TCC to Amend a CCN for a 345-KV Double Circuit Transmission Line in Kenedy County, Texas*, Docket No. 34298 (Oct. 29, 2007) (denying CHA intervention in CCN for transmission line), available at http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34298_53_566364.PDF.

190. *Coastal Habitat Alliance v. Pub. Util. Comm'n of Tex.*, 294 S.W.3d 276 (Tex. App.—Austin 2009, no pet.).

191. *Coastal Habitat Alliance*, 294 S.W.3d at 287–88.

192. The Peñascal Wind Power Project began commercial operations in April 2009. *Iberdrola Opens Texas Wind Farm, Receives Approval for Vermont Project*, RENEWABLEENERGYWORLD.COM, Apr. 21, 2009, <http://www.renewableenergyworld.com/real/news/article/2009/04/iberdrola-opens-texas-wind-farm-receives-approval-for-vermont-project?cmid=WNL-Wednesday-April22-2009>. Gulf Wind began commercial operations in phases beginning in early 2009 with 283.2 MW operational by the end of the year. AWEA, U.S. Wind Energy Projects—Texas, <http://awea.org/projects/Projects.aspx?s=Texas> (last visited May 10, 2010).

193. State environmental statutes may also be applicable. See *Kerncrest Audubon Gulf Soc'y v. City of Los Angeles Dep't of Water & Power*, No. F050809, 2007 WL 2208806, at *1 (Cal. Ct. App. Aug. 2, 2007).

Depending upon the proposed or actual location of a wind farm, the Clean Water Act, which requires a permit for filling wetlands,¹⁹⁴ the Migratory Bird Treaty Act,¹⁹⁵ the Endangered Species Act,¹⁹⁶ and, if it is on federal land or involves major action by a federal agency, the National Environmental Policy Act (“NEPA”)¹⁹⁷ may apply.¹⁹⁸ The Migratory Bird Treaty Act and the Endangered Species Act are the environmental statutes that are most likely to apply to wind farms on private land. The Migratory Bird Treaty Act was originally passed to implement a 1917 treaty between the United States and Canada to protect migrating birds from excessive hunting pressures, and several federal courts have interpreted the statute as limited to this purpose.¹⁹⁹ Other federal courts, however, have applied it to commercial activities, such as large-scale commercial farming operations whose pesticide-treated alfalfa fields poisoned migrating birds.²⁰⁰ An attempt by the Flint Hills Tallgrass Prairie Heritage Foundation to apply the Migratory Bird Treaty Act to wind farms was rejected by the Kansas federal district court on the ground that it does not provide for a private cause of action or, at most, a highly limited one.²⁰¹

A more immediate concern for wind farms is the Endangered Species Act, which has been broadly interpreted by the U.S. Fish and Wildlife Service (“FWS”) to prohibit modification of the habitat of a federally listed endangered species.²⁰² It is best known in Texas for its application to Golden-cheeked Warblers and Black-capped Vireos, which are found almost exclusively in central Texas. Their designation as an endangered species in the mid-1990s brought Austin’s expansion to the western portions of Travis County to a sudden halt. The upshot was that many developers were required to designate significant portions of their as-yet undeveloped tracts as protected habitat and off-limits to any

194. 33 U.S.C. § 1344 (2006).

195. 16 U.S.C. § 703 (2006).

196. *Id.* § 1538.

197. 42 U.S.C. §§ 4321–70 (2006).

198. For a brief discussion of the variety of federal permits that may be required, see David A. Domansky, *The Indefatigable Power of Wind*, 55 ROCKY MTN. MIN. L. INST. 5-1, 5-17 to 5-18 (2009).

199. *See, e.g.*, *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1574 (S.D. Ind. 1996); *see also* *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997).

200. *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978), *aff’d*, 578 F.2d 259 (9th Cir. 1978); *see also* *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999).

201. *Flint Hills Tallgrass Prairie Heritage Found. v. Scottish Power*, No. 05-1025-JTM, 2005 WL 427503 (D. Kan. 2005); *see also* Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. LAW 1167 (2008). For cases that address the impact of wind farms on bird and bat populations, *see* *Kernerest Audubon Soc’y v. Los Angeles Dep’t of Water & Power*, No. F050809, 2007 WL 2208806 (Cal. Ct. App. Aug. 2, 2007); *Mountain Cmty. for Responsible Energy v. Pub. Serv. Comm’n of W. Va.*, 665 S.E.2d 315 (W. Va. 2008).

202. *Babbit v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1995).

development. The city and county also acquired large tracts that were designated as protected habitat. The limited wind resource and cost of land makes it highly unlikely that wind farms will be built in or near Travis County, but the Endangered Species Act has been highlighted as a potential obstacle to the Kenedy County wind farms, which are being built in what may be the habitat of the ocelot, a federally listed feral animal of the cat family.

More significantly, a pending designation by the FWS may drastically affect wind farms currently planned for the Texas Panhandle. The Lesser Prairie Chicken, a type of grouse, has long been “a species of concern,” and its status has recently been moved from an “8” to a “2.” This change in status may mean that the Lesser Prairie Chicken will be listed as an endangered species, perhaps within a relatively short time. Two of the last remaining areas where the bird is found in the wild are in the Texas Panhandle, which is where a large number of wind farms are either located or planned.

One might ask why 400-foot and taller wind turbines would disturb a grassland bird that, like other grouse or the more familiar quail, fly only when alarmed and then at quite low levels that are well below the turbine blades. The answer lies in the bird’s evolutionary development. The Lesser Prairie Chicken is found only in prairies and apparently perceives any tall structure as a perching roost for raptors such as hawks and owls. The Lesser Prairie Chickens either leave an area where there are tall structures or stop breeding. Although the nacelle on most modern wind turbines is now constructed to make perching by raptors or other birds impossible, grassland birds are obviously unaware that their predators cannot use the new structures. If the Lesser Prairie Chicken is designated as an endangered species, the impact on the development of wind farms in the Panhandle may be quite similar to the impact of the Golden-cheeked Warbler’s endangered designation on Austin, Travis County, and much of central Texas.

The Endangered Species Act has already been applied against wind farms in other states. Recently a federal district court enjoined a West Virginia wind farm until the project obtained a permit under the Act. The court held that the project violated the federal law by improperly endangering Indiana bats.²⁰³ The suit was brought by two groups, Animal Welfare Institute and Mountain Communities for Responsible Energy, and it demonstrates how opponents of the wind industry can use federal environmental laws to delay wind projects in the United States.

203. *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009). The order granting the injunction is available at <http://www.awionline.org/ht/a/GetDocumentAction/i/16992>.

D. FAA

A permitting requirement of general concern for wind farms is that required by the Federal Aviation Administration (“FAA”). Modern wind turbines typically stand on 80-meter (262-foot) high towers, and their blades often reach over 400 feet into space. Many wind farms fall under FAA jurisdiction because they exceed the height threshold it has established. In such situations the developer of the wind farm must file a notice with the FAA, which determines if the wind farm will be an airspace hazard.²⁰⁴

The third tactic that the Coastal Habitat Alliance has used in its attempts to halt further construction and operation of wind farms along the Texas coast has been a petition to the FAA to force it to conduct an environmental review under NEPA. The Alliance’s argument is that the FAA’s administrative determination constitutes a “major federal action” and is thus subject to NEPA requirements.²⁰⁵

Although it is not clear that a private litigant or an individual landowner has standing to oppose an FAA determination favoring a wind farm, a governmental entity, such as a county that is opposed to a wind farm, may find that fighting an FAA permit is a way to stop or at least slow a project. Although no cases on this topic have arisen yet in Texas, a case involving a project in Nevada that was decided by the D.C. Circuit Court held that the FAA improperly approved a proposed wind farm located near the site of Las Vegas’ future airport. Clark County, where the airport was to be located, was concerned because the turbines would be in the path of airplanes that were taking off or landing. The court held that the FAA did not properly support its findings that the turbines would not interfere with the airport’s radar system and that the turbines would be a safe distance below the take-off and landing paths.²⁰⁶ Thus, fighting the FAA permits required for wind farms is one more way opponents may try to fight or stall the installation of wind farms.

204. 14 C.F.R § 77 (2010).

205. U.S. F.A.A., Coastal Habitat Alliance, Petition for Rulemaking & Collateral Relief Regarding the Impacts of Wind Turbines in Texas, at 1–2 (Dec. 3, 2008), available at http://www.coastalhabitatalliance.org/documents/petitiontoFAA_FINAL_12-03-08_001.pdf.

206. Clark County, Nev. v. F.A.A., 522 F.3d 437, 438–39 (D.C. Cir. 2008).

VI. TRANSMISSION²⁰⁷

Other than siting, the major issue confronting wind farms throughout the country is transmission. As former Senate Energy Committee Chairman Bennett Johnston stated, “[T]ransmission is the Achilles Heel of renewable energy development.”²⁰⁸ The wind resource in Texas is primarily in west Texas and the Panhandle—areas where the transmission lines lack the capacity to transfer significant amounts of electricity to the Dallas/Fort Worth metroplex, Houston, central Texas, and other high-population, high-use areas. Texas differs from all other states in that the electric grid is almost entirely intrastate, so FERC has relatively little authority over Texas transmission lines. Texas transmission lines are regulated almost entirely by the PUCT, and technical duties fall to the Electric Reliability Council of Texas (“ERCOT”).

While the simple solution to the transmission problem is to upgrade and build more transmission lines, transmission policy in Texas complicates the situation and creates a chicken and egg situation. Wind generation can be built very quickly, but transmission lines require much longer periods of time for land acquisition, permitting, and construction. Developers and project financiers are unwilling to build generation projects when there is inadequate transmission because of the risk that the energy generated cannot be transported to load, and they are unable (or unwilling) to tie up large amounts of capital for long periods of time in the security deposits needed to get new lines built under the existing system. However, new transmission cannot be built unless utilities can demonstrate that there is a proven need, and that need does not arise until interconnection agreements are signed, security is posted, and generation is built. Thus, a chicken and egg problem exists in Texas and many other high wind states because the developers cannot build wind farms without transmission, and the utilities cannot build transmission without wind farms.

After years of discussion and failed attempts to solve the issue, in 2005 the Texas Legislature passed Senate Bill 20, which created the Competitive Renewable Energy Zone (“CREZ”) process and tasked the

207. Portions of this section contain excerpts from Becky H. Diffen, *Competitive Renewable Energy Zones: How the Texas Wind Industry is Cracking the Chicken and Egg Problem*, 46 ROCKY MTN. MIN. L. INST. 47 (2009). See the full article for a more detailed explanation of the CREZ process through Spring of 2009. See also Diana M. Liebmann, *Recent Developments, Changes in Wind Energy Law and Regulation in Texas*, 4 TEX. J. OIL GAS & ENERGY L. 371 (2008–2009).

208. *Oversight Hearing for the Federal Energy Regulatory Commission Before the Energy and Environment Subcommittee of the Committee on Energy and Commerce United States House of Representatives*, 111th Cong. 3 (2010) (testimony of Chairman Jon Wellinghoff, Federal Energy Regulatory Commission, referring to comment of former Senate Energy Committee Chairman Bennett Johnston), available at <http://www.ferc.gov/EventCalendar/Files/20100323141517-Wellinghoff-3-23-10.pdf>.

PUCT with overseeing it by designating the CREZs, selecting transmission service providers, and periodically reporting back to the legislature.²⁰⁹

The Commission has taken a multi-step approach to creating and implementing the CREZs. After Senate Bill 20 passed, the first step was for the PUCT to adopt rules implementing the CREZ process. Through Project 31852, PUCT Substantive Rule 25.174 (the “CREZ Rule”) was adopted in December 2006 for this purpose.²¹⁰ This rule laid out the guidelines for how the entire CREZ process would proceed, including how CREZs would be selected, the criteria to be considered, how transmission service providers would be selected, and the 10% deposit that would be required from developers. While the PUCT was working on adopting the CREZ Rule, it also authorized ERCOT to engage AWS TrueWind (“AWS”) to perform an analysis of wind resources throughout the state.²¹¹ AWS presented the top 25 wind regions in the state, based on capacity factor.²¹² The best areas identified were in the Panhandle and the McCamey area—all regions that would require substantial transmission upgrades in order to bring electricity to load. Once the zones were identified, ERCOT (through a stakeholder process) then developed preliminary transmission plans to provide the PUCT with a variety of transmission options and estimated costs to accommodate the zones in various combinations and deliver CREZ electricity to customers.

In January 2007 the CREZ Docket (Docket 33672) was initiated, and the case quickly became historic as over 65 parties intervened and over 1,400 documents were filed,²¹³ including financial commitment testimony to support over 24,000 MW of CREZ projects across 16 zones.²¹⁴ Developers were asked to file testimony nominating zones to be CREZs and demonstrating the financial commitment the developer had thus far made to projects in that zone. After a hearing on the merits in June, the PUCT issued an Interim Order on October 2, 2007 designating five CREZs based on the eight study zones with the greatest financial commitment (plus adjustments to include nearby projects).²¹⁵ The Commission based its selection on a variety of factors including wind

209. TEX. UTIL. CODE ANN. § 39.904(g)–(k) (Vernon 2007).

210. 16 TEX. ADMIN. CODE § 25.174 (2007).

211. *Id.* § 25.174(a)(2); Diana Liebmann, *Issues Affecting Electric Transmission Infrastructure Development*, 7th ANNUAL GAS & POWER INST. 3, at 3 (Univ. of Tex. Sch. of Law Continuing Legal Educ. 2008).

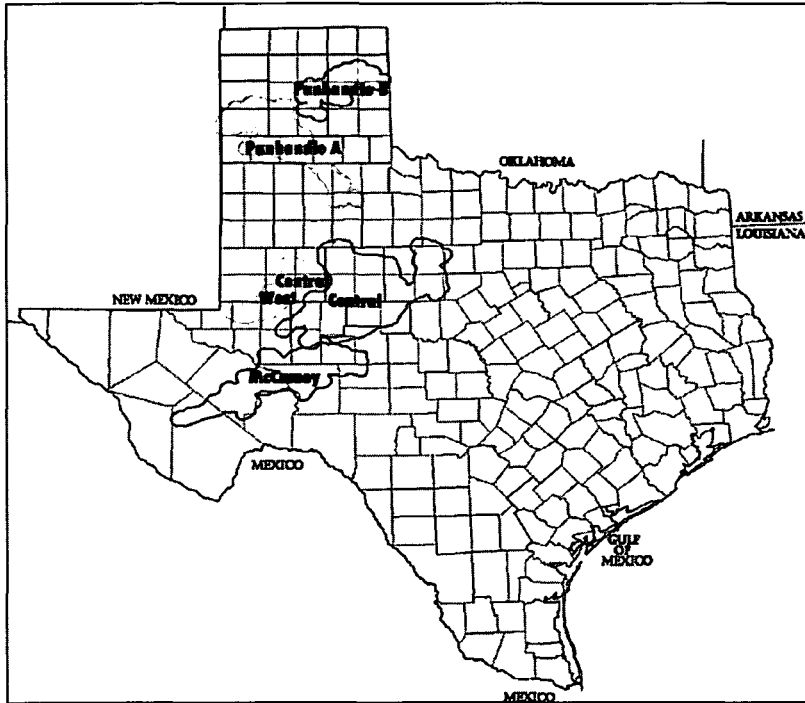
212. Liebmann, *supra* note 211.

213. Specifically, 1,483 documents had been filed as of September 1, 2009.

214. Patrick R. Cowlshaw, *Wind Power and the CREZ Case: What's Decided, What's Not, and What's Next*, 2008 PUB. UTIL. LAW ANNUAL MEETING & SEMINAR 7 (State Bar of Tex.), available at <http://images.jw.com/com/publications/996.ppt> (last visited May 1, 2010).

215. Pub. Util. Comm'n of Tex., Interim Order, Docket No. 33672 (Oct. 2, 2007).

resources, financial commitment testimony of the developers, and transmission system reliability and ancillary service requirements.



The contentious part of the order involved deciding whether all of the power should go to ERCOT, or whether some of the Panhandle zones should be designated to provide power to the Southwest Power Pool (“SPP”)—the interstate electrical grid the Panhandle region connects. The majority (consisting of Chairman Hudson and Commissioner Smitherman) did not want ERCOT ratepayers to have to pay for transmission upgrades that would benefit those in other states.²¹⁶ Commissioner Parsley argued that the Panhandle zones should deliver power to SPP. She stated that bringing electricity generated from wind in SPP all the way to ERCOT did not meet the requirements of Senate Bill 20 for transmission to be built “in a manner that is most beneficial and cost-effective to customers.”²¹⁷ Rather, she argued that delivering the power to SPP would be the most beneficial and cost-effective choice.²¹⁸

The Interim Order also laid out the ground rules for a second study to be performed by ERCOT—the Transmission Optimization Study.

216. *Id.* at 6. The SPP, which is not connected to ERCOT and therefore is not subject to FERC’s jurisdiction, connects the Texas Panhandle with multiple other states.

217. *Id.* at 29 (Commissioner Parsley, dissenting).

218. *Id.*

ERCOT was tasked with optimizing transmission plans for four alternative capacity levels and providing cost estimates for the different scenarios. The following four scenarios were studied:

	Scenario 1 (MW)	Scenario 2 (MW)	Scenario 3 (MW)	Scenario 4 (MW)
Panhandle A	1,422	3,191	4,960	6,660
Panhandle B	1,067	2,393	3,270	0
McCamey	829	1,859	2,890	3,190
Central	1,358	3,047	4,735	5,615
Central West	474	1,063	1,651	2,051
CREZ Wind Capacity	5,150	11,553	17,956	17,516

Scenario 1 would bring the total amount of renewables in the state to 10,000 MW as provided for in the RPS. Scenario 3 provides for the total amount of MW nominated by developers in the designated CREZs, and Scenario 2 falls in the middle. Commissioner Parsley's dissent resulted in the creation of Scenario 4 (which removes the 1,000 MW per developer cap and has the Panhandle zones delivering energy to SPP).²¹⁹ Including the existing wind capacity of 6,903 MW, these various scenarios studied transmission solutions for a total of 12,053 to 24,859 MW of wind on the ERCOT system. In comparison, the 2006 study only looked at a total of 4,850 to 10,000 MW of wind on the grid. The number and complexity of different transmission options increases exponentially as more MW are studied, making the Transmission Optimization Study more complex than the earlier studies.²²⁰

ERCOT held a series of hearings and work sessions with the various stakeholders to try to determine the level, type, and cost of additional services necessary to maintain the reliability of the grid with increasing levels of wind generation. Their task was to design comprehensive transmission solutions benefiting the entire system and leading to increased reliability, not just radial lines built out to the zones.²²¹ ERCOT progressed by brainstorming different concepts, testing for performance, developing and testing the best designs, and finally determining the best performing plan for each scenario. In addition, the transmission solutions took into consideration expansion paths from the lower scenarios so that

219. *Id.* at 11.

220. Dan Woodfin, *CREZ Transmission Optimization (CTO) Study*, 2008 WIND ENERGY INST. 6 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

221. Liebmann, *supra* note 211, at 8.

if a lower scenario was chosen, it could be expanded under future CREZ proceedings.²²²

ERCOT filed the Transmission Optimization Study in April 2008, along with the GE Ancillary Services Study. The PUCT wanted to ensure that ERCOT could maintain system reliability under any of the four CREZ scenarios,²²³ and the GE study concluded that with existing technology and operations, the grid could manage 15,000 MW of wind without radical alterations. Unfortunately, because this study was commissioned early on in the process, it only studied a maximum injection of 15,000 MW. Later on in the process, the commissioners began reviewing larger numbers, but it was too late for the study to look at these higher amounts. The study concluded that, for 15,000 MW, the costs of the required ancillary upgrades would be small relative to the large fuel savings from wind.²²⁴

Once the ERCOT studies were filed, there was another round of filings and a hearing on the merits. On August 15, 2008, the Final Order was filed with the commissioners selecting Scenario 2 (the transmission lines on the map on the next page), which will lead to transmission being built to support a total of 18,456 MW of renewable generation (11,552 MW of new wind plus 6,903 MW of existing and under construction projects). The Order identified the major improvements needed, including new and upgraded transmission lines, and generally described where the new lines would interconnect to the grid.

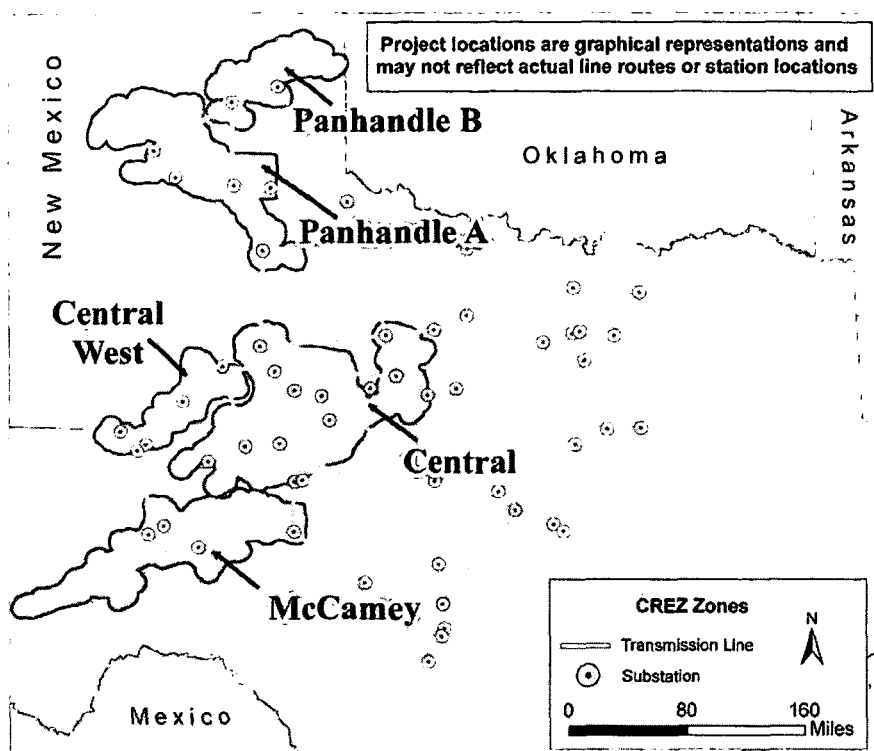
In the Final Order Commissioner Parsley again dissented. She agreed that Scenario 2 should be selected, but argued that the wind generated in the Panhandle should be carved out and connected to the SPP grid. She explained that, in addition to her previously made cost-effectiveness argument, carving out the SPP wind would also help ERCOT stay closer to the 15,000 MW that the GE Study had confirmed the grid could handle.²²⁵

222. Woodfin, *supra* note 220.

223. *Id.*

224. Pub. Util. Comm'n of Tex., ERCOT's Informational Filing of the GE Ancillary Services Study, Docket No. 33672, at 1 (Apr. 2, 2008); Cowlshaw, *supra* note 214.

225. Pub. Util. Comm'n of Tex., Final Order, Docket No. 33672, at 53 (Aug. 15, 2008).



Chairman Hudson and Commissioner Smitherman explained their reasons for selecting Scenario 2. Scenarios 3 and 4 were eliminated due to extremely high transmission costs and, perhaps even more importantly, because the GE Study had not determined whether the ERCOT system could handle that much wind. Scenario 1B was not chosen because it only provided for 12,000 MW, and by the end of 2008, close to 10,000 MW was already expected to be on the grid. Thus, it would not lead to the wind expansion envisioned by the legislature and would likely lead to the need for another costly and lengthy CREZ proceeding in the near future. The economies of scale, incremental costs, environmental benefits, and fuel cost savings were also factors.²²⁶ Finally, the transmission plan for Scenario 1B did not adequately address existing congestion issues.²²⁷

Because the CREZ transmission system selected extends into the Panhandle and beyond the traditional ERCOT boundary, the Final Order also directed interested parties to obtain an order from FERC

226. See Pub. Util. Comm'n of Tex., Memo to Commissioners re: the Benefits of Scenario 2, Docket No. 33672, at 3, (July 17, 2008); Pub. Util. Comm'n of Tex., Memo to Commissioners re: Scenario 2, Docket No. 33672, at 2, (July 17, 2008).

227. Pub. Util. Comm'n of Tex., Memo to Commissioners re: Scenario 2, Docket No. 33672, at 2, (July 17, 2008).

disclaiming jurisdiction over any CREZ lines located in the Panhandle.²²⁸ Several developers and transmission service providers joined together to file a petition with FERC. On November 5, 2009 FERC issued a declaratory order disclaiming jurisdiction over the CREZ lines.²²⁹

The estimated cost for Scenario 2, as determined by the ERCOT study, is \$4.93 billion, plus collection system costs of \$580 million to \$820 million, in order to build over 2,334 miles of new 345 kilovolt transmission lines in over 100 separate transmission projects.²³⁰ The design is also expandable to Scenario 3 and provides for an estimated 64,031 gigawatt-hours of wind generation annually at an average fuel-cost savings of \$38 per MWh.²³¹

A. Transmission Service Providers

Another important aspect of the CREZ process is the selection of Transmission Service Providers (“TSPs”)—the companies responsible for actually building the transmission lines. The CREZ Rule stated that after identifying the CREZs, the Commission would select TSPs and set schedules and reporting requirements for those chosen.²³² Project No. 34108 was established for companies interested in building transmission to propose various solutions and declare the projects they were interested in building. Companies who were not yet certificated TSPs applied simultaneously to become certificated.²³³ In Rule 25.216 the Commission decided that for existing facility upgrades the owner should build the upgrade (unless the owner does not want to build or there is good cause for someone else to build).²³⁴ Rule 25.216 also states that in order to become a qualified TSP, the TSP must demonstrate that it has the ability to construct, operate, and maintain a facility identified in the CREZ plan.²³⁵ The Commission based TSP selection on the TSP’s “ability to provide the needed CREZ transmission facility in the manner that is the most cost effective and beneficial to consumers,”²³⁶ which includes the TSP’s ability to finance, license, operate, and maintain facilities; the TSP’s cost projections and proposed schedule; its use of historically

228. Pub. Util. Comm’n of Tex., Order on Rehearing, Docket No. 33672, at 23-24 (Oct. 7, 2008).

229. Cross Texas Transmission, LLC, FERC Docket No. EL09-66-000, 129 FERC ¶ 61,106 (2009).

230. Pub. Util. Comm’n of Tex., Order on Rehearing, Docket No. 33672, at 16 (Oct. 7, 2008).

231. *Id.* at 18, 22, 42.

232. 16 TEX. ADMIN. CODE § 25.174(c) (2007).

233. Liebmann, *supra* note 211, at 8.

234. 16 TEX. ADMIN. CODE § 25.216(d)(2) (2008).

235. *Id.* § 25.216(e).

236. Barry T. Smitherman, Chairman, Pub. Util. Comm’n of Tex., Presentation: CREZ: Who Will Build the Transmission and When? (Feb. 19, 2008), at 9, available at <http://www.puc.state.tx.us/about/commissioners/smitherman/present/pp/CREZ.pdf>.

underutilized businesses; and its track record and understanding of the project.²³⁷

After attempts at settlement failed, the Commission ultimately issued an Order on Rehearing on May 16, 2009 naming eight entities to serve as TSPs: Oncor, Lower Colorado River Authority, South Texas Electric Cooperative, Sharyland, Electric Transmission Texas, Lone Star, Wind Energy Transmission Texas, and Cross Texas Transmission.²³⁸ The decision was appealed by the City of Garland, one of the parties not selected by the Commission to serve as a CREZ TSP.²³⁹

On January 15, 2010 Judge Yelonowsky of the 345th Judicial District Court of Travis County ruled on the City of Garland's appeal. He held that some of the Commission's findings about its jurisdiction over municipally-owned utilities were legally irrelevant. Judge Yelonowsky remanded the case back to the Commission so that the commissioners could reconsider their TSP selection.²⁴⁰

The Commission immediately severed those projects designated as priority into a separate docket so that the TSPs could be reselected and the CCN process could continue with minimal interruption.²⁴¹ In a series of open meetings, the Commissioners discussed the remaining lines and determined that the City of Garland could potentially be assigned two projects if they were able to work out a joint venture with South Texas Electric Cooperative. The Commission severed these two projects from the remand docket for further consideration and issued an order on March 30, 2010 re-assigning all of the remaining lines to the same TSPs to which they were originally assigned.²⁴² As of May 2010, the Commission has granted the City of Garland some time to determine whether it can work out a joint venture agreement to build the one line still remaining to be assigned.²⁴³

While the City of Garland appeal was taking place, the CREZ TSPs were hard at work preparing their CCN applications. CCNs have already been filed for many of the priority projects, and a few CCN applications have been approved by the Commission. The sequencing of the other CCNs will be determined in Docket No. 36802, and the CREZ

237. *Id.*

238. Pub. Util. Comm'n of Tex., Order on Rehearing, Docket No. 35665 (May 15, 2009).

239. *See* City of Garland, Tex. v. Pub. Util. Comm'n, No. D-1-GV-09-001199 (345th Dist. Ct., Travis County, Tex.).

240. *Id.*

241. Pub. Util. Comm'n of Tex., Order No. 1 Severing Priority Projects, Docket No. 37902 (Feb. 4, 2010); Pub. Util. Comm'n of Tex., Order on Remand, Docket No. 37928 (Feb. 25, 2010).

242. Pub. Util. Comm'n of Tex., Order No. 3 Severing Specific Subsequent Projects, Docket No. 37902 (Mar. 19, 2010); Pub. Util. Comm'n of Tex., Order on Remand, Docket No. 37902 (Mar. 30, 2010).

243. *See* Pub. Util. Comm'n of Tex., Docket No. 38045 (Apr. 9, 2010).

transmission projects are expected to be completed by the end of 2013.²⁴⁴ The Commission has created a website that tracks the status of each of the transmission projects: <http://www.texascrezprojects.com>. This website will facilitate coordination amongst the various parties and keep the public informed of the progress.

The TSP selection raises important policy issues, most notably the fact that transmission companies competed for the opportunity to build new transmission to serve a CREZ.²⁴⁵ Traditionally each transmission company in Texas had a PUCT-approved distribution service territory that delivered electricity to consumers. When an upgrade was needed, the local company made the investment.²⁴⁶ However, it now appears that competitive transmission provision has arrived in Texas, and multiple companies have expressed an interest in building the transmission to serve CREZs, as well as investing in other transmission projects.²⁴⁷ Ratepayers will likely benefit from competition in transmission as the Commission will evaluate proposals to determine which will lead to lower costs instead of relying on traditional incumbents.²⁴⁸ Thus, this policy change will likely bring even more competition to the Texas electricity industry.

B. Dispatch Priority

For many developers dispatch priority was a critical aspect of the CREZ process. The CREZ process was created to solve congestion, but many fear that the CREZ lines will quickly become congested as they are only designed to accommodate a certain number of new projects and many more MW worth of projects were proposed for the CREZs than were ultimately designated. The developers who filed testimony about their projects, thus losing the competitive advantage of keeping project locations and information secret, felt that they should be granted dispatch priority—priority in using the CREZ lines if they become congested. The developers took the risk in disclosing confidential information, and they were also going to be responsible for making deposits to cover 10% of the costs of building the new CREZ transmission. Those opposed to dispatch

244. See Pub. Util. Comm'n of Tex., Docket No. 36802, Proceeding to Sequence Certificate of Convenience and Necessity Applications for the Subsequent Projects for the Competitive Renewable Energy Zones.

245. Dreyfus, *supra* note 30, at 18.

246. *Id.* at 20.

247. *Id.* at 21. For example, in Docket No. 33734, Warren Buffet and Berkshire Hathaway have proposed a venture between American Electric Power and MidAmerican Energy Holdings Company.

248. *Id.*

priority argue that it conflicts with Texas's open access transmission laws and policy.²⁴⁹

The CREZ Rule states that if capacity exceeds the amount designated in the CREZ order, the PUCT "may initiate a proceeding and limit interconnection to and/or establish dispatch priorities regarding the transmission system in the CREZ."²⁵⁰ Project 34577 was opened for the Commission to establish policy relating to excess development in CREZs. Workshops were held, and there were numerous filings with proposals for various types of priority dispatch and arguments against it. After significant debate, the Commission ultimately elected not to grant dispatch priority at this time, although they did leave the door open for the possibility of revisiting the issue if congestion does become a problem.²⁵¹

This project also addressed the issue of financial commitment. Senate Bill 20 requires the Commission to consider the level of financial commitment by wind developers before granting CCNs for CREZ lines.²⁵² While the original CREZ Rule required all developers to post 10% collateral, the Commission chose to alter this requirement. The McCamey, Central, and Central West zones have significant levels of wind generation already installed, and developers provided testimony that demonstrated considerable additional commitment in the form of leases, interconnection agreements, and other development expenditures. The Commission determined that this level of financial commitment was sufficient for CREZ CCNs to be granted in those west Texas zones.²⁵³ The Commission held that further proceedings were necessary to determine whether sufficient financial commitment existed in the two Panhandle zones, and the order modified the CREZ rule to provide for an additional proceeding on this issue.²⁵⁴

C. Financial Commitment in the Panhandle

Docket No. 37567 was initiated to determine whether sufficient financial commitment exists in the Panhandle zones for the Commission to grant CCNs. According to the amended rule, developers can demonstrate financial commitment in four ways:

- (1) with existing projects,

249. Steve Baron, *Texas Competitive Renewable Energy Zones 2010–2013*, 2010 WIND, SOLAR & RENEWABLES INST. 4, at 10 (Univ. of Tex. Sch. of Law Continuing Legal Educ.).

250. 16 TEX. ADMIN. CODE § 25.174(e) (2007).

251. Pub. Util. Comm'n of Tex., Order Adopting Amendments to § 25.174, Project No. 34577, at 77–78 (Oct. 15, 2009).

252. TEX. UTIL. CODE ANN. § 39.904(g)(3) (Vernon 2007).

253. Pub. Util. Comm'n of Tex., Order Adopting Amendments to § 25.174, Project No. 34577, at 73–74 (Oct. 15, 2009).

254. *Id.* at 74.

- (2) with projects under construction,
- (3) with signed interconnection agreements with a CREZ TSP, and
- (4) by posting collateral.²⁵⁵

The rule requires demonstrated financial commitment of 1,595.5 MW in Panhandle A and 1,196.5 MW in Panhandle B.²⁵⁶ Only two existing projects qualified under the rule; no projects are under construction, and no projects have a qualifying signed interconnection agreement. Thus, the vast majority of the financial commitment will have to be demonstrated by the posting of collateral.

The rule requires collateral to be posted at a rate of \$15,350 per MW, unless the developer has land under lease, in which case they may post at a rate of \$10,000 per MW.²⁵⁷ All of the developers who stated an intent to post collateral qualified for the \$10,000 level, so for every 100 MW of wind development, developers had to post \$1 million. The collateral could be in the form of a parent guaranty or a letter of credit.²⁵⁸

The developers were first asked to file letters of intent to post collateral so that the Commission could determine if there was enough development to justify the posting of collateral. Ten developers filed letters of intent, and on April 21, 2010, the Commission issued an Interim Order finding that there was sufficient levels of intent. The developers had 30 days to post the required collateral, but one developer dropped out. More than the required collateral was posted in Panhandle B—a total of 1,246.5 MW—but only 1,535 MW was posted in Panhandle A—a shortage of 60.6 MW. The Commission will now have the option of entering a second phase of the proceeding where it can consider additional factors.²⁵⁹ It is possible the Commission could decide that there is not enough financial commitment in the Panhandle to grant the Panhandle CCNs, or the Commission may determine that the collateral posted, in combination with the existing projects and other investment in the region, show sufficient commitment to justify building the lines.

The financial commitment docket is the last anticipated CREZ docket to affect all of the parties. There will be numerous CCN dockets over the coming year, but it appears the policy side of the CREZ process is finally coming to an end, once the Panhandle financial commitment docket is decided.

255. 16 TEX. ADMIN. CODE § 25.174(d)(3) (2007).

256. *Id.* § 25.174(d)(4).

257. *Id.* § 25.174(d)(7).

258. *Id.*

259. *Id.* § 25.174(d)(6).

D. CREZ in the Courts

Appeals of the CREZ process are creating new case law in the Texas courts. In appeals of PUCT decisions, deference is given to the agency because they are the experts.²⁶⁰ However, appeals can take years to progress, especially if the district court decision is appealed up to the Third Court of Appeals and the Texas Supreme Court.²⁶¹ In December 2008 Texas Industrial Energy Consumers (“TIEC”) appealed the Commission’s Final Order in the CREZ Docket.²⁶² In the complaint, TIEC argued that the evidence before the Commission failed to support the Scenario 2 level of transmission.²⁶³ One attorney involved in the proceeding believed that TIEC would lose its appeal because the commissioners did not select Scenario 3 or 4, but rather picked between 1 and 2, which are more conservative levels. It would be difficult for TIEC to successfully argue that what the Commission did was unreasonable under a substantial evidence level of review, which is a very hard standard to meet.²⁶⁴ This appeal has been dormant since its filing.

The TSP docket was also dependent on the courts. Several of the TSPs selected, including Electric Transmission Texas (“ETT”), are new TSPs. ETT was granted a CCN by the Commission outside of the CREZ process, but it was appealed.²⁶⁵ On appeal, the district court reversed stating that TSPs must also have a distribution service territory.²⁶⁶ This ruling would have meant that only incumbent TSPs would be capable of building transmission lines, and several of the TSPs selected would not have been able to build CREZ lines.²⁶⁷ The case went to the Texas Third Court of Appeals in Austin, and the district court’s decision was overruled.²⁶⁸ The court held that a CCN could be granted to a transmission-only utility without a service area.²⁶⁹

As discussed above, the City of Garland appealed the TSP decision, and the district court’s ruling delayed the filing of CCNs that were scheduled for winter 2009 and spring 2010. Further litigation is also possible as many developers are unhappy with the dispatch priority

260. Diana Liebmann, Presentation: Changes in Wind Energy Law and Regulation in Texas, 2009 Oil, Gas, & Energy Law Symposium, at 8.

261. Baron, *supra* note 147, at 16.

262. *Tex. Indus. Energy Consumers v. Pub. Util. Comm’n of Tex.*, No. D-1-GN-08-004631 (419th Dist. Ct., Travis County, Tex. filed Dec. 22, 2008); Liebmann, *supra* note 207, at 2.

263. Baron, *supra* note 147, at 15–16.

264. Liebmann, *supra* note 260.

265. Liebmann, *supra* note 211, at 8.

266. *Id.*; *City of Harlingen v. Pub. Util. Comm’n of Tex.*, No. D-1-GV-08-00253 (345th Dist. Ct., Travis County, Tex. Oct. 8, 2008), *appeal docketed*, No. 03-08-00793-CV (Tex. App.—Austin Dec. 31, 2008).

267. Liebmann, *supra* note 211, at 8; Baron, *supra* note 147, at 10.

268. *Pub. Util. Comm’n of Tex. v. Cities of Harlingen*, No. 03-08-00793, 2010 WL 1173070, at *1 (Tex. App.—Austin 2010, no pet. h.).

269. *Id.* at *7.

decision and landowners are fighting the siting of transmission lines through the CCN process.

E. Transmission Beyond CREZ

The transmission issue is starting to play out in states across the country. Some states have already begun to confront the issue. Examples include the Renewable Energy Transmission Initiative in California, the Western Renewable Energy Zones on the West Coast, the CapX 2020 Project in Minnesota, and a Renewable Energy Zones initiative in Colorado.²⁷⁰ New Mexico, North Dakota, and Wyoming's state legislatures have each created state-run transmission authorities to develop new transmission facilities.²⁷¹ There also has been discussion of National Renewable Energy Zones. U.S. Senator Harry Reid of Nevada introduced the 2007 Clean Renewable Economic Development Act that included a plan for National Renewable Energy Zones.²⁷² While the bill was not passed, new bills seeking a national 15-25% renewable energy standard have come before both the U.S. Senate and the U.S. House of Representatives.²⁷³ As the Obama administration's focus shifts from healthcare to energy, it is possible National Renewable Energy Zones could be reconsidered as part of an energy bill with a national renewable energy standard or in conjunction with the work being done to create a national smart grid.

VII. MARKETING

There are two reported Texas cases involving the marketing and sale of wind energy. In *FPL Energy v. City of Austin* the issue was whether a curtailment provision in an agreement between FPL Energy and Austin's electric utility, Austin Energy, applied when ERCOT issued instructions

270. For more information on each initiative, see the following: W. RENEWABLE ENERGY ZONES INITIATIVE, WESTERN RENEWABLE ENERGY ZONES—PHASE 1 REPORT (2009), available at <http://www.westgov.org/wga/publicat/WREZ09.pdf>; California Energy Commission, Renewable Energy Transmission Initiative, <http://www.energy.ca.gov/reti> (last visited May 10, 2010); CapX2020, <http://www.capx2020.com/faq.html> (last visited May 10, 2010); Craig Cox, *A Direct Line to the Wind*, WINDLETTER (AWEA), Jan. 2008, available at http://www.awea.org/windletter/wl_08jan.html; XcelEnergy, <http://www.rmao.com/wtpp/SB100.html> (last visited May 10, 2010); Western Area Power Administration, <http://www.wapa.gov/transmission/eptp.htm> (last visited May 10, 2010).

271. See Irma S. Russell & Jeffery S. Dennis, *State and Local Governments Address the Twin Challenges of Climate Change and Energy Alternatives*, 23 SUM. NAT. RES. & ENV'T 9, 12 (2008).

272. S. 1531, 110th Cong. (2007); Alborz Nowamooz, *Inadequacy of Transmission Lines: A Major Barrier to the Development of Renewable Energy*, 3 ENVTL. & ENERGY LAW & POL'Y J. 176, 179 (2008); *Nevada Senator Calls for National Renewable Energy Zones*, RENEWABLEENERGYWORLD.COM, Sept. 28, 2007, <http://www.renewableenergyworld.com/realnews/story?id=50100>.

273. See S. 433, 111th Cong. (2010); H.R. 890, 111th Cong. (2010).

that electric energy producers limit their generation to lessen congestion on the grid.²⁷⁴

The basic facts, somewhat simplified, are as follows: In 1999 Austin Energy entered into a Wind Power Purchase Agreement with Florida Power & Light (“FPL”).²⁷⁵ Acting under the agreement, FPL constructed a wind farm in West Texas. The key provision in the agreement—and the one that gave rise to the lawsuit—was a clause that long-time oil and gas practitioners will recognize as analogous to the old take-or-pay clauses in gas purchase agreements. It required Austin Energy to pay FPL for electricity that FPL delivered to the Point of Delivery. The clause stipulated that if Austin Energy did not accept the energy delivered at that point, Austin Energy would pay a specified amount arrived at by a formula. Austin Energy’s failure to accept the delivery was called a *curtailment*. The original point of delivery was the Austin city limits. However, the agreement provided that FPL could change the point of delivery from Austin to the point of interconnection, which was where the electricity generated by the wind farm went onto the grid. Subsequently FPL opted to change the delivery point from Austin to the point of interconnection adjacent to its wind farm.²⁷⁶

FPL began producing electricity in 2001. On a few occasions there was a curtailment, as defined by the agreement—Austin Energy did not accept the electricity and instead paid the curtailment fee. The litigation arose when ERCOT issued a curtailment order requiring FPL to limit its generation and delivery of electricity in order to prevent congestion or overloading the transmission lines. FPL argued that Austin Energy was liable for a curtailment fee regardless of the cause or source of the curtailment. Austin Energy, of course, responded that it was not obligated to pay the fee because it did not refuse to accept any electricity actually being delivered to it at the point of interconnection.²⁷⁷

In ruling for Austin Energy the court pointed to the specificity of the contract provision, which stated that curtailment does not occur until electricity is delivered at the Point of Delivery and Austin Energy either cannot or will not accept it. Because FPL’s electric generation was stopped due to an ERCOT order, and the delivery point had been moved to west Texas next to the wind farm, Austin Energy never failed to accept any energy delivered to the grid.²⁷⁸

274. FPL Energy v. City of Austin, 240 S.W.3d 456 (Tex. App.—Amarillo 2007, no pet.).

275. FPL Energy is now NextEra Energy.

276. FPL Energy, 240 S.W.3d at 457–58.

277. *Id.* at 458–60.

278. *Id.* at 463–64.

Another marketing case involving FPL Energy is currently being considered by the Dallas Court of Appeals.²⁷⁹ TXU argues that FPL Energy breached its contract because it did not provide the contractually required minimum quantities of energy and RECs under several power purchase agreements between the two parties.²⁸⁰ TXU filed suit to obtain liquidated damages from FPL, but the trial court held in FPL's favor, finding that the liquidated damages clause was unenforceable.²⁸¹ The trial court also agreed with FPL that TXU was contractually obligated to provide the transmission capacity necessary for FPL to deliver the energy.²⁸² FPL was unable to deliver the energy from its wind farms because of the curtailment issues discussed above. In addition to these rulings made by the judge, the case was also tried before a jury on the issue of whether FPL had failed to deliver the required quantities of energy and RECs. The jury awarded TXU damages of \$8.9 million and also found that TXU had covered for the electricity that was not delivered.²⁸³ Thus, TXU received nothing. Briefs have been filed in the appellate case, and oral arguments took place on February 9, 2010. Regardless of the outcome, both of these cases demonstrate the importance of language used in the power purchase agreements. This is one area where wind and contract law meet.

VIII. CONCLUSION: THE FUTURE OF WIND LAW

The relative paucity of judicial and regulatory rulings belies the wealth of legal issues that are pending and will certainly arise in the wind industry within the next few years. It is inevitable that Texas courts will be faced with surface owners disputing the validity of wind severances, disputes over the interpretation of clauses in wind leases, and conflicts between oil and gas companies and wind companies as well as between wind companies and surface owners and their lessees.

If wind law follows the path of oil and gas law, which deals with the other major energy sources in Texas, it will develop in a way that is generally favorable to the wind industry. It seems reasonably likely that wind severances will be upheld²⁸⁴ and that wind farms will have priority of

279. *TXU Portfolio Mgmt. Co. v. FPL Energy*, No. 05-08-0184-CV (Tex. App.—Dallas filed Nov. 25, 2008).

280. Brief of Appellant at 4, *TXU Portfolio Mgmt. Co.*, No. 05-08-0184-CV, 2009 WL1435429.

281. *TXU Portfolio Mgmt. Co. v. FPL Energy*, No. 04-10314-F (116th Dist. Ct., Dallas, County, Tex. Aug. 27, 2008).

282. *Id.*

283. Brief of Appellees and Cross-Appellants at 3, *TXU Portfolio Mgmt. Co.*, No. 05-08-0184-CV, 2009 WL2565840.

284. Whether such a ruling would actually be helpful to wind development in the long run is debatable; for several decades commentators have pointed to the problems posed by fractionalization of oil and gas rights. See, e.g., Owen L. Anderson & Ernest E. Smith, *The Use of Law to Promote Domestic Exploration and Development*, 50TH OIL & GAS INST. 2-1, 2-4 to 2-18

surface use over other surface owners and users other than oil and gas and mining companies. The likelihood of a wind farm being enjoined on the ground that it constitutes a nuisance seems improbable.

The long-standing Texas tradition of supporting the development of its energy resources and the legislative enactments strongly supportive of wind energy make it unlikely that regulations prohibiting wind farms will be adopted in Texas, as they have been adopted in some counties in Kansas.²⁸⁵ Of course federal environmental regulations may have this effect in certain areas where wetlands, birds, and other environmental issues arise. It also seems reasonably likely that spacing regulations will ultimately be adopted, either on a county-wide basis or applied on a case-by-case basis by a state agency, and that at some point minimum property line set-back requirements will be imposed.

Additional regulatory developments regarding transmission are inevitable, as grid operators such as ERCOT review and modify the requirements for grid interconnections in order to address reliability and related concerns with having large amounts of wind-generated electricity on the system. Litigation is beginning to arise as ERCOT not only changes the requirements for future wind farms but also attempts to add requirements for existing projects.²⁸⁶ Opposition from existing wind farms to retroactive changes has already arisen because changed requirements are exponentially more costly for companies with facilities that were not designed and built with the changed requirements in mind. Meeting the changed requirements will result in currently operating wind projects incurring capital costs that they may be unable to recover. Indeed, as of May 2010, Docket No. 37817, an appeal by multiple wind generators against a change made by ERCOT, was pending at the PUCT.²⁸⁷ The new CREZ transmission lines that, like wind farms, are being built across scenic and previously unspoiled areas will give rise to their own spate of litigation. Some lawsuits will be over the least disruptive routes and the adequacy of compensation for the easement condemned by the transmission company. Others will involve environmental issues as the lines transect the habitats of federally listed species.

(Matthew Bender 1999); Ernest E. Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129 (1964). Landowners often reserve an interest in the mineral estate when they convey the surface and devise interests in the mineral estate in equal shares to their descendants. The result is multiple owners, many of whom cannot be located by oil and gas companies seeking a lease or cannot agree on a lease even when located. Such fractionalization may also occur with severed wind rights.

285. See *Zimmerman v. Bd. of County Comm'rs of Wabaunsee County*, 218 P.3d 400 (Kan. 2009).

286. See Mark Del Franco, *Wind Energy Under Fire Within ERCOT*, N. AM. WINDPOWER, Apr. 2010.

287. See Pub. Util. Comm'n of Tex., *Appeal and Complaint by Iberdrola Renewables, Inc., et al. of ERCOT Decision to Approve PRR 830*, Docket No. 37817 (Dec. 22, 2009).

Litigation over wind law has also begun to occur in areas such as contract law and intellectual property law. Two of the largest turbine manufacturers are currently engrossed in litigation over patents GE has obtained for certain wind turbine technologies.²⁸⁸ The power marketing cases are some of the first examples of wind and contract law intersecting, but certainly more are coming in areas such as construction, financing, and the sale and acquisition of wind projects.

In the long run, however, despite all of these potential litigation issues, it seems highly likely that Texas state law and regulation will prove as hospitable and encouraging to the development of wind energy as it has to oil and gas.

288. See *ITC Wind Turbine Ruling Makes Green Policy Waves*, LAW360, Feb. 5, 2010, http://ip.law360.com/print_article/147744.

